TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1907.

No. 357.

HENRY CLAY PIERCE, APPELLANT,

vs.

EDMUND P. CREECY, CHIEF OF POLICE OF THE CITY OF ST. LOUIS.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MISSOURI.

FILED JUNE 14, 1907.

(20,760.)

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., APRIL 13, 1908.

1 The United States of America to Edmund P. Creecy, Chief of Police of the City of St. Louis, Greeting:

You are hereby cited and admonished to be and appear in the United States Supreme Court at Washington, D. C., thirty days from and after the day this Citation bears date, pursuant to an appeal, filed in the Clerk's office of the Circuit Court of the United States for the Eastern Division of the Eastern Judicial District of Missouri, wherein Henry Clay Pierce is appellant, *plaintiff in error*, and you are appellee, to show cause, if any there be, why the order and judgment rendered against the said appellant, as in said appeal mentioned, should not be corrected, and why speedy justice should not be done the parties in that behalf.

Witness, the Honorable Elmer B. Adams, Judge of the Circuit Court of the United States for the Eastern Division of the Eastern District of Missouri, this 15th day of May, in the year of our Lord one thousand nine hundred and seven.

ELMER B. ADAMS,
United States Circuit Judge for the Eastern District of Missouri.

Service of the above citation accepted this May 15, 1907.
EDMUND P. CREECY,
By CHAS. W. BATES,
His Attorney.
E. P. CREECY, *Appellee.*

2 [Endorsed:] No. 5446. United States Circuit Court, Eastern Division of the Eastern Judicial District of Missouri. In the Matter of Henry Clay Pierce. Citation. Filed May 15, 1907. James R. Gray, clerk.

3 UNITED STATES OF AMERICA,
Eastern Division of the Eastern Judicial District of Missouri, ss:

In the Circuit Court of the United States in and for said Division of said District.

Be it remembered: that heretofore to-wit: on the 8th day of May, A. D. 1907, there was filed in the office of the Clerk of said Court, a petition for a writ of *habeas corpus*, which said Petition is in words and figures as follows, to-wit:

Petition.

4 In the Circuit Court of the United States within and for the Eastern Division of the Eastern District of Missouri, *ss.*

To the Hon. E. B. Adams, Judge of the Circuit Court of the United States of America within and for the Eastern Division of the Eastern District of Missouri:

The petition of Henry Clay Pierce respectfully shows unto your Honor:

I.

That he is imprisoned, detained, confined and restrained of his liberty, at the City of St. Louis, within the District aforesaid, by Edward P. Creecy, the Chief of Police of said City of St. Louis, in violation of the laws and constitution of the United States.

II.

That he is not committed, imprisoned, detained, confined or restrained by virtue of the final judgment or decree of any competent tribunal of civil or criminal jurisdiction, or by virtue of any execution issued upon such judgment or decree.

III.

That the true cause or pretense of such confinement, imprisonment, detention and restraint, according to the best knowledge and belief of your petitioner, is the following warrant issued by Hon. Joseph W. Folk, Governor of the State of Missouri, to-wit:

5 [SEAL.] "The State of Missouri to the Sheriff or Marshal of any County or City in this State:

Whereas, the Governor of the State of Texas has demanded of the Governor of this State, H. Clay Pierce, fugitive from justice from said State; and whereas, The Governor of Texas has produced to me a copy of an Indictment in said State, certified to be authentic, charging said fugitive with having committed the crime of False Swearing.

Now, therefore I, Joseph W. Folk, Governor of the State of Missouri, do hereby command you to arrest the said H. Clay Pierce anywhere within the limits of this State, and him secure and deliver to G. S. Mathews, who is the agent of said State of Texas, duly authorized to receive the said fugitive.

And I do hereby command all Sheriffs, Marshals, Constables and Police Officers to whom this warrant may be shown, to aid and assist in the execution of this process. And you will make due return to me on this warrant of your proceeding thereunder.

In testimony whereof, I hereunto set my hand and cause to be affixed the Great Seal of the State of Missouri. Done at the City of Jefferson, this 21st. day of February, in the year of our Lord, One Thousand Nine Hundred and Seven.

[GREAT SEAL.]

By the Governor:

JOS. W. FOLK.

JNO. E. SWANGER,
Secretary of State."

which said warrant was issued pursuant to the laws of the United States upon the application of Hon. T. M. Campbell, Governor of the State of Texas, which is as follows, viz:

6 "DEPARTMENT OF STATE, *State of Texas:*

In the name and by the authority of the State of Texas.

To the Governor of the State of Missouri:

Whereas, It appears by the annexed documents, which are hereby certified to be authentic, that H. Clay Pierce stands charged with False swearing committed in the State of Texas, and information having been received that the said H. Clay Pierce has fled from justice, and has taken refuge in Missouri.

Now, therefore, I, T. M. Campbell, Governor of the State of Texas, have thought proper, in pursuance of the provisions of the Constitution and Laws of the United States, to demand the surrender of the said H. Clay Pierce as fugitive from justice, and that he be delivered to G. S. Mathews, who is hereby appointed the Agent on the part of the State of Texas, to receive H. Clay Pierce.

Given under my hand and seal of the State affixed at the City of Austin, this the 11th day of February, A. D. 1907, and of the Independence of the United States of America, the one hundred and thirty-first and of Texas the seventy-first year.

T. M. CAMPBELL, *Governor.*

[SEAL.]

By the Governor:

L. T. DASHIELL,
Secretary of State."

To which requisition was and is attached a certified copy of the Indictment alleged to have been found against the petitioner by a Grand Jury of the County of Travis, in said State of Texas, which Indictment is literally as follows, to-wit:

"In the name and by the authority of the State of Texas.

The Grand Jurors of Travis County, in said State, duly empaneled sworn and charged as such at the September Term, A. D. 1906, of the District Court of said County, in and for the Fifty-third Judicial District, upon their oaths, in said Court, present: That Henry Clay Pierce, in said County and State, on or about the 31st day of May, in the year of our Lord nineteen hundred, and before the presentment of this indictment, did then and there present himself and make his personal appearance before N. H. Nagle, a duly and legally qualified and acting Notary Public within and for the County of Travis and State of Texas, who was then and there duly authorized by law as such officer and Notary Public to administer an oath; and the said Henry Clay Pierce, having been duly sworn by the said N. H. Nagle, acting in her capacity as such officer and Notary Public, did then and there unlawfully, deliberately, corruptly and wilfully, under the sanction of the oath so legally administered to him by the said N. H. Nagle, acting in the capacity aforesaid, make his voluntary false statement and declaration in writing as follows:

7 *Affidavit.*

THE STATE OF TEXAS, *County of Travis:*

I, Henry Clay Pierce, do solemnly swear that I am the President, (President, Secretary, Treasurer or Director) of the Corporation known and styled Waters-Pierce Oil Company, duly incorporated under the laws of Missouri, on the 29th day of May, 1900, and now transacting or conducting business in the State of Texas, and that I am duly authorized to represent said Corporation, in making this affidavit, and I do further solemnly swear that the said Waters Pierce Oil Company, known and styled as aforesaid, has not since the 31st day of January, 1900, created, entered into or become a member of, or a party to, and was not, on the 31st day of January, 1900, nor at any day since that date, and is not now, a member of, or a party to any pool, trust, agreement, combination confederation or understanding, with any other corporation, partnership, individual or any other person or association of persons, to regulate or fix the price of any article of manufacture, mechanism, merchandise, commodity, convenience, repair, any product of mining, or any article or thing whatsoever, or the price or premium to be paid for insuring property against loss or damage by fire, lightning, storm, cyclone, tornado, or any other kind of policy issued by the parties aforesaid; and that it has not entered into or become a member of, or a party to, any pool, trust, agreement, contract, combination or confederation, to fix or limit the amount of supply or quantity of any article of manufacture, mechanism, merchandise, commodity, convenience, repair, or any product of mining, or any article or thing whatsoever, or the price or premium to be paid for insuring property against loss or damage by fire, lightning, storm, cyclone, tornado, or any other kind of policy issued by the parties aforesaid; and that it has not issued, and does not own any trust certificates for any corporation, agent, officer or employé, or for the directors or stockholders of any corporation, has not entered into, and is not now in any combination, contract, or agreement with any person or persons, corporation or corporations, or with any stockholders or directors thereof, the purpose and effect of which said combination, contract, or agreement would be to place the management or control of such combination or combinations or the manufactured product thereof, in the hands of any trustee, or trustees, with the intent to limit or fix the price, or lessen the production and sale of any article of commerce, use or consumption, or to prevent, restrict, or diminish the manufacture or output of any such article; that it has not entered into any conspiracy, defined in the preceding sections of this act to form or secure a trust or monopoly in restraint of trade; that it has not been since January 31, A. D. 1900, and is not now a monopoly by reason of any conduct on its part, which would constitute it a monopoly under the provisons of sections 2, 3, 4, 5, 6, 10, and 11, of this Act and is not the owner or lessee of a patent to any machinery intended, used or designed for manufacturing any raw material or preparing the same for market by any wrapping, baling

or other process, and while leasing, renting or operating the same, refuses or fails to put the same on the market for sale; that it has not issued, and does not own any trust certificates, and has not, for any corporation or any agent, officer or employé thereof, or for the directors or stockholders thereof, entered into, and is not now in any combination contract or agreement with any person or persons, corporation or corporations, or with the stockholders, director or any officer, agent or employé of any corporation or corporations, the purpose and effect of which combination, contract or agreement, would be a conspiracy to defraud, as defined in section 1 of this Act, or to create a monopoly, as defined in sections 2, 3, 4, 5, 6, 10 and 11 of this Act.

8 HENRY CLAY PIERCE.
(President, Secretary, Treasurer or Director.)

Subscribed and sworn to before me, a Notary Public within and for the County of Travis, this 31st day of May, 1900.

(Signed) N. H. NAGLE.
Notary Public.

Whereas, in truth and in fact the said Waters Pierce Oil Company, mentioned in the above false statement and declaration in writing, had since the 31st day of January, 1900, created, entered into, and become a member of, and a party to, and was on the 31st day of January, 1900, and on every day since the 31st day of January, 1900, up to and on the 31st day of May, 1900, then and there a member of, and a party to, a pool, trust, agreement, combination, confederation, and undertaking with other corporations, individuals, and other persons and association of persons, to-wit: with the Standard Oil Company of New Jersey, a corporation incorporated under the laws of the State of New Jersey, and with all the Standard Oil Companies of the United States, the names and descriptions of said Companies being to said Grand Jurors unknown after diligent inquiry, and with John D. Rockefeller, John D. Archbold, H. H. Rogers and other individuals and persons whose names and a description of whom are to said Grand Jurors unknown after diligent inquiry, to regulate and fix the price of petroleum and all of the products of petroleum being articles of manufacture and a commodity and a convenience and a product of mining and an article and a thing; and, whereas, in truth and in fact the said Waters Pierce Oil Company, hereinbefore mentioned, had since the 31st day of January, 1900, created, entered into and become a member of, and a party to, and was on the 31st day of January, 1900, and was on every day since the said 31st day of January, 1900, up to and on the 31st day of May, 1900, then and there a member of and a party to a pool, trust, agreement, combination, confederation and undertaking with other corporations, individuals, and other persons and association of persons, to-wit: The Standard Oil Company of New Jersey, a corporation, incorporated under the laws of the State of New Jersey and with all the Standard Oil Companies of the United States, the names and descriptions of said Companies being to said Grand Jurors un-

known after diligent inquiry, and with John D. Rockefeller, John D. Archbold, H. H. Rogers and other individuals and persons whose names and a description of whom are to said Grand Jury unknown after diligent inquiry, to fix and limit the amount of supply and quantity of petroleum and all of the products of petroleum, the said petroleum and all the products of petroleum being articles of manufacture and a commodity and a convenience and a product of mining and an article and a thing; and whereas, in truth and in fact the said Waters Pierce Oil Company, hereinbefore mentioned had since the 31st day of January, 1900, and on every day since said 31st day of January, 1900, up to the 31st day of May, 1900, issued, and did then and on the 31st day of May, 1900, issued trust certificates to another corporation, to-wit: the Standard Oil Company of New Jersey, hereinbefore described, its agents, officer and employé, to-wit, one J. P. Gruet, and one John D. Johnson, and other agents, officers and employés of said Standard Oil Company of New Jersey whose names and descriptions are to said Grand Jurors unknown after diligent inquiry, whereby the said Standard Oil Company of New Jersey then and there became the owner of the majority of all the shares of stock of the said Waters Pierce Oil Company and the owner of a controlling interest in said Waters Pierce Oil Company, which said false statement, so made as aforesaid, by the said Henry Clay Pierce, was not then and there required by law nor made in the course of judicial proceedings. Yet the same was then and there, nevertheless, wilfully and deliberately made and was wilfully
9 and deliberately false, as he the said Henry Clay Pierce, then and there well knew.

Against the peace and dignity of the State.

JEFFERSON JOHNSON,
Foreman of the Grand Jury.

(Endorsed:) No. 15,357. The State of Texas *vs.* Henry Clay Pierce. Indictment. Offense: False Swearing. Filed in the District Court of Travis County, for the 53rd Judicial District this 1 day of Nov'r A. D. 1906. Jas. P. Hart, Clerk District Court, Travs Co., Texas. By E. Huppertz, Deputy. Witnesses for the State: Miss N. H. Nagle, D. H. Hardy, Jefferson Co. Tex., J. P. Gruet."

IV.

That said restraint, imprisonment, detention and confinement are illegal, and that the illegality thereof consists in this, to-wit:

First. It is not shown by any sufficient averments in the said Indictment that the facts stated or opinions expressed by petitioner in the affidavit set forth, in said Indictment were false when the said affidavit was made, and hence the said Indictment charges no offense under the laws of the State of Texas. That so far as the averments of the said Indictment are concerned, the conclusion, judgment and opinion of petitioner expressed in the affidavit, are only alleged to be false in the conclusion, judgment and opinion of the Grand Jury preferring said Indictment.

Second. That the affidavit made by your petitioner was in the form prescribed by an Act of the Legislature of the State of Texas,

entitled "An Act to prohibit pools, trusts, monopolies and conspiracies to control business and prices of articles; to prevent the formation or operation of pools, trusts, monopolies and combinations of charters of corporations that violate the terms of this Act, and to authorize the institution and prosecution of suits therefor," which was approved May 25th, 1899, and became effective January 31st, 1900, (Gen. Laws Texas, 1899, p. 246.) and that the language of said affidavit must be construed and interpreted in connection with the related text of the Act of which it forms a part; that the pools, trusts, combinations, conspiracies and monopolies prohibited by said Act were such only as were formed by such natural or artificial legal entities as were then engaged in business in the State of Texas, and the Indictment does not show or charge that the Waters Pierce Oil Company, organized on May 29th, 1900, as stated by petitioner in said affidavit, contrary to the fact stated by your petitioner
10 in said affidavit, was a member of, or party to, any pool, trust, agreement, combination, confederation or understanding with any other corporation, partnership, individual, or any person, or association of persons, then or theretofore transacting or doing business in the State of Texas, for the purpose of fixing the price or limiting the output or quantity of any article or thing whatsoever to be sold or marketed in said State of Texas.

Third. That no charge of perjury or false swearing could legally be predicated upon any matter or thing stated in said affidavit, for the reason that the statements therein contained are mere expressions of legal conclusions or opinions upon a state of facts existent in the belief of the affiant.

Fourth. The affidavit being required by law, if false, could not be false swearing under the laws of the State of Texas.

Fifth. For that it appears upon the face of the said Indictment that more than four years elapsed between the date of the commission of the alleged offense and the finding of the said Indictment.

V.

That no application for a writ of *habeas corpus* for the relief herein sought, has been made before or refused by any Court or Judge; and that the legality of the restraint, detention or imprisonment of your petitioner, has not already been adjudged upon a prior writ of *habeas corpus*.

Wherefore, your petitioner prays that Your Honor will award him a writ of *habeas corpus*, directed to —— —— Chief of Police aforesaid, requiring and commanding him forthwith to bring your petitioner before Your Honor, and that upon the execution of said writ, Your Honor will order that your petitioner be wholly discharged and released from his said custody and imprisonment, and for such other and further relief as to Your Honor shall seem meet, and to law and justice shall appertain, and as in duty — will ever pray.

HENRY CLAY PIERCE, *Petitioner.*

11 JNO. D. JOHNSON,
H. S. PRIEST,
Attorneys for Petitioner.

STATE OF MISSOURI, *City of St. Louis, ss:*

—— —— being by me first duly sworn, upon oath says, that the matters and things stated in the foregoing petition are true to the best of his knowledge, information and belief.

HENRY CLAY PIERCE.

Subscribed and sworn to before me, this 8th day of May, 1907. My term expires August 2d, 1910.

C. W. BLOCK,
Notary Public.

And thereupon the said 8th day of May, A. D. 1907, the following among other proceedings were had in said cause and appear of record, to-wit:

Before his Honor, Judge Adams.

5446.

In the Matter of HENRY CLAY PIERCE, Petitioner. *Habeas Corpus.*

Now at this day comes Henry Clay Pierce by Messrs. John D. Johnson and H. S. Priest, his attorneys, and files and presents to the Court his application for a writ of *habeas corpus* in his behalf herein, upon due consideration whereof the Court doth order that said application be and it is hereby allowed and that the said writ issue directed to Edmond P. Creecy, Chief of Police of the City of St. Louis, Missouri, returnable forthwith according to law, which is accordingly done; and now comes said respondent Edmond P. Creecy, and in due obedience to the said writ of *habeas corpus* now produces in Court the body of said petitioner and also files his return to said writ, whereupon it is Ordered that this matter be set down for hearing on Saturday, May 11" 1907 at ten o'clock A. M. or as soon thereafter as counsel can be heard and that said petitioner be admitted to bail which the Court doth fix at the sum of Ten Thousand Dollars, and now said Henry Clay Pierce as principal, and John D. Johnson and H. S. Priest as sureties approved by the Court, do acknowledge themselves to owe and be indebted to the United States of America in the penal sum of Ten Thousand Dollars to be made and levied of their respective goods and chattels, lands and tenements, and to the said United States of America rendered, conditioned, however, to be void if the said Henry Clay Pierce shall be and appear before this Court on Saturday May 11" 1907 at 10 o'clock A. M. and from day to day thereafter as and when ordered by the Court until discharged, and that he will abide by any and all orders and judgments that the Court may make in said proceeding, and that he will not depart from Court without leave thereof.

111/2

And thereupon on the said 8th day of May, A. D. 1907, there was issued out of the Clerk's office of said Court, a Writ of *Habeas*

Corpus, which with the Marshal's return thereon, is in words and figures as follows, to-wit:

In the Circuit Court of the United States for the Eastern Division of the Eastern Judicial District of Missouri.

The President of the United States of America to Edmond P. Creecy, Chief of Police of the City of St. Louis, State of Missouri, Greeting:

We command you, that you do forthwith according to law, without excuse or delay, bring, or cause to be brought, before the Honorable Circuit Court of the United States for the Eastern Division of the Eastern Judicial District of Missouri, the body of Henry
12 Clay Pierce by whatever name or addition he is known or called, who is unlawfully detained in your custody, as it is said, together with the day and cause of his detention, then and there to abide such order and direction as our said Court shall make in that behalf, and have with you this writ, with your return endorsed thereon, and herein fail not at your peril.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this eighth day of May, in the year of our Lord one thousand nine hundred and Seven.

Issued at office in the City of St. Louis, in said Division of said District, the day and year last aforesaid. In witness whereof I hereto set my hand and affix the seal of said Court this May eighth, A. D. 1907.

JAMES R. GRAY,
Clerk of said Court.

A true copy.

Attest:

[SEAL.] JAMES R. GRAY, *Clerk.*

Return of Marshal.

UNITED STATES OF AMERICA,
Eastern Division of the Eastern
Judicial District of Missouri, ss:

I hereby certify that I executed this writ at St. Louis, Missouri in the above named District, this 8th day of May, 1907, by delivering the original thereof to the within named Edmond P. Creecy, Chief of Policy of the City of St. Louis, Missouri.

WM. L. MORSEY,
U. S. Marshal.
By J. J. WILLIAMS, *Deputy.*

13 And thereupon to-wit: on the said 8th day of May, A. D. 1907, there was filed in said cause a Return to writ of *habeas corpus,* which is in words and figures as follows, to-wit:

Return to Writ of Habeas Corpus.

In the Circuit Court of the United States for the Eastern Division of the Eastern Judicial District of Missouri.

In the Matter of HENRY CLAY PIERCE.

Now comes Edmond P. Creecy and, for return to the writ of *habeas corpus* this day issued out of this Honorable Court, respectfully states that he now produces in court the body of the said Henry Clay Pierce in obedience to the command of said writ; and that he, the said Edmond P. Creecy is the Chief of Police of the City of St. Louis and by virtue of his said office, under the authority of a warrant issued by the Governor of the State of Missouri bearing date the 21st day of February, 1907, a copy of which is attached hereto and made a part hereof, he caused the said Henry Clay Pierce to be arrested in the City of St. Louis, Missouri, on this day, and is now holding the said Henry Clay Pierce by virtue of said warrant and of his said office; that your respondent has caused to be notified the Agent of the State of Texas named in the said warrant, to-wit, G. S. Mathews; and that respondent has caused to be arrested the said Henry Clay Pierce and is holding the said Henry Clay Pierce for the purpose of delivering him to the said G. S. Mathews, Agent of the State of Texas aforesaid, as set out in the warrant of the Governor of the State of Missouri.

E. P. CREECY,
Chief of Police of the City of St. Louis.

14 And afterwards to-wit: on the 10th day of May, A. D. 1907 there was filed in said cause an Answer to the Return, which is in words and figures as follows, to-wit:

Answer to Return.

In the Circuit Court of the United States Within and For the Eastern Division of the Eastern District of Missouri, *ss.*

In re HENRY CLAY PIERCE, Petitioner, in *Habeas Corpus.*

The petitioner, for answer to the return of Edmund P. Creecy, Chief of Police of the City of St. Louis, Missouri, says that said return, as made by said Edmund P. Creecy, is, in so far as it states the warrant pursuant to which he apprehended and detained petitioner, true, but that the said warrant, so specified in the return is predicated upon the following requisition made by the Governor of the State of Texas, pursuant to the laws of the United States, upon the Governor of the State of Missouri, to-wit:

15 "DEPARTMENT OF STATE, *State of Texas:*

In the Name and by the Authority of the State of Texas.

To the Governor of the State of Missouri:

Whereas, It appears by the annexed documents, which are hereby certified to be authentic, that H. Clay Pierce stands charged with False swearing committed in the State of Texas, and information having been received that the said H. Clay Pierce has fled from justice, and has taken refuge in Missouri.

Now, therefore, I, T. M. Campbell, Governor of the State of Texas, have thought proper, in pursuance of the provisions of the Constitution and Laws of the United States, to demand the surrender of the said H. Clay Pierce as fugitive from justice, and that he be delivered to G. S. Mathews, who is hereby appointed the Agent on the part of the State of Texas, to receive H. Clay Pierce.

Given under my hand and seal of the State affixed at the City of Austin, this the 11th day of February, A. D. 1907, and of the Independence of the United States of America, the one hundred and thirty-first and of Texas the seventy-first year.

[SEAL.] T. M. CAMPBELL, *Governor.*

By the Governor:

L. T. DASHIELL,
Secretary of State."

And that to said requisition was and is attached a certified copy of the Indictment alleged to have been found against the petitioner by a Grand Jury of the County of Travis, in said State of Texas, which Indictment is literally as follows, to-wit:

"In the Name and by the Authority of the State of Texas.

The Grand Jurors of Travis County, in said State, duly empaneled sworn and charged as such at the September Term, A. D. 1906, of the District Court of said County, in and for the Fifty-third Judicial District, upon their oaths, in said Court, present: That Henry Clay Pierce, in said County and State, on or about the 31st day of May, in the year of our Lord nineteen hundred, and before the presentment of this indictment, did then and there present himself and make his personal appearance before N. H. Nagle, a duly and legally qualified and acting Notary Public within and for the County of Travis and State of Texas, who was then and there duly authorized by law as such officer and Notary Public to administer an oath; and the said Henry Clay Pierce, having been duly sworn by the said N. H. Nagle, acting in her capacity as such officer and Notary Public, did then and there unlawfully, deliberately, corruptly and willful-y, under the sanction of the oath so legally administered to him by the said N. H. Nagle, acting in the capacity aforesaid, make his voluntary false statement and declaration in writing
16 as follows:

Affidavit.

THE STATE OF TEXAS, *County of Travis:*

I, Henry Clay Pierce, do solemnly swear that I am the President, (President, Secretary, Treasurer or Director) of the Corporation known and styled Waters Pierce Oil Company, duly incorporated under the laws of Missouri, on the 29th day of May, 1900, and now transacting or conducting business in the State of Texas, and that I am duly authorized to represent said Corporation, in making this affidavit, and I do further solemnly swear that the said Waters Pierce Oil Company, known and styled as aforesaid, has not since the 31st day of January, 1900, created, entered into or become a member of, or a party to, and was not, on the 31st day of January, 1900, nor at any day since that date, and is not now, a member of, or a party to any pool, trust, agreement, combination, confederation or understanding with any other corporation, partnership, individual, or any other person or association of persons, to regulate or fix the price of any article of manufacture, mechanism, merchandise, commodity, convenience, repair, any product of mining, or any article or thing whatsoever, or the price or premium to be paid for insuring property against loss or damage by fire, lightning, storm, cyclone, tornado, or any other kind of policy issued by the parties aforesaid; and that it has not entered into or become a member of, or a party to, any pool, trust, agreement, contract, combination or confederation, to fix or limit the amount of supply or quantity of any article of manufacture, mechanism, merchandise, commodity, convenience, repair, or any product of mining, or any article or thing whatsoever, or the price or premium to be paid for insuring property against loss or damage by fire, lightning, storm, cyclone, tornado, or any other kind of policy issued by the parties aforesaid; and that it has not issued, and does not own any trust certificates for any corporation, agent, officer or employé, or for the directors or stockholders of any corporation, has not entered into, and is not now in any combination, contract, or agreement with any person or persons, corporation or corporations, or with any stockholders or directors thereof, the purpose and effect of which said combination, contract or agreement would be to place the management or control of such combination or combinations, or the manufactured product thereof, in the hands of any trustee or trustees, with the intent to limit or fix the price, or lessen the production and sale of any article of commerce, use or consumption, or to prevent, restrict, or diminish the manufacture or output of any such article; that it has not entered into any conspiracy, defined in the preceding sections of this act, to form or secure a trust or monopoly in restraint of trade; that it has not been since January 31, A. D. 1900, and is not now a monopoly by reason of any conduct on its part, which would constitute it a monopoly under the provisions of sections 2, 3, 4, 5, 6, 10 and 11 of this Act, and is not the owner or lessee of a patent to any machinery intended, used or designed for manufacturing any raw material or preparing

the same for market by any wrapping, baling or other process, and while leasing, renting or operating the same, refuses or fails to put the same on the market for sale; that it has not issued, and does not own any trust certificates, and has not, for any corporation or any agent, officer or employé thereof, or for the directors or stockholders thereof, entered into, and is not now in any combination, contract or agreement with any person or persons, corporation, or corporations, or with the stockholders, directors or any officer, agent or employé of any corporation or corporations, the purpose and effect of which combination, contract or agreement would be a conspiracy to defraud, as defined in section 1 of this Act, or to create a monopoly, as defined in Sections 2, 3, 4, 5, 6, 10 and 11 of this Act.

17 HENRY CLAY PIERCE.
(President, Secretary, Treasurer or Director.)

Subscribed and sworn to before me, a Notary Public within and for the County of Travis, this 31st day of May, 1900.

(Signed) N. H. NAGLE,
Notary Public.

Whereas, in truth and in fact the said Waters Pierce Oil Company, mentioned in the above false statement and declaration in writing, had since the 31st day of January, 1900, created, entered into, and become a member of, and a party to, and was on the 31st day of January, 1900, and on every day since the 31st day of January, 1900, up to and on the 31st day of May, 1900, then and there a member of, and a party to, a pool, trust, agreement, combination, confederation, and undertaking with other corporations individuals, and other persons and association of persons, to-wit: with the Standard Oil Company of New Jersey, a corporation incorporated under the laws of the State of New Jersey, and with all the Standard Oil Companies of the United States, the names and descriptions of said Companies being to said Grand Jurors unknown after diligent inquiry, and with John D. Rockefeller, John D. Archbold, H. H. Rogers, and other individuals and persons whose names and a description of whom are to said Grand Jurors unknown after diligent inquiry, to regulate and fix the price of petroleum and all of the products of petroleum being articles of manufacture and a commodity and a convenience and a product of mining and an article and a thing; and, whereas, in truth and in fact the said Waters Pierce Oil Company, hereinbefore mentioned, had since the 31st day of January, 1900, created, entered into and become a member of, and a party to, and was on the 31st day of January, 1900, and was on every day since the said 31st day of January, 1900, up to and on the 31st day of May, 1900, then and there a member of and a party to a pool, trust, agreement, combination, confederation and undertaking with other corporations, individuals, and other persons and association of persons, to-wit: The Standard Oil Company of New Jersey, a corporation, incorporated under the laws of the State of New Jersey and with all the Standard Oil Companies of the United States, the names and descriptions of said Companies being to said Grand Jurors unknown after diligent

inquiry, and with John D. Rockefeller, John D. Archbold, H. H. Rogers and other individuals and persons whose name and a description of whom are to said Grand Jury unknown after diligent inquiry, to fix and limit the amount of supply and quantity of petroleum and all of the products of petroleum, the said petroleum and all the products of petroleum being articles of manufacture and a commodity and a convenience and a product of mining and an article and a thing; and whereas, in truth and in fact the said Waters Pierce Oil Company, hereinbefore mentioned had since the 31st day of January 1900, and on every day since said 31st day of January 1900, up to the 31st day of May, 1900, issued, and did then and on the 31st day of May, 1900, issued trust certificates to another corporation, to-wit: the Standard Oil Company of New Jersey, hereinbefore described, its agents, officer and employé, to-wit, one J. P. Gruet, and one John D. Johnson, and other agents, officers and employés of said Standard Oil Company of New Jersey whose names and descriptions are to said Grand Jurors unknown after diligent inquiry, whereby the said Standard Oil Company of New Jersey then and there became the owner of the majority of all the shares of stock of the said Waters Pierce Oil Company and the owner of a controlling interest in said Waters Pierce Oil Company, which said false statement, so made as aforesaid, by the said Henry Clay Pierce, was not then and there required by law nor made in the course of judicial proceedings. Yet the same was then and there, nevertheless, wilfully and deliberately made and was wilfully and deliberately false, as he the said
18 Henry Clay Pierce, then and there well knew.

Against the peace and dignity of the State.

JEFFERSON JOHNSON,
Foreman of the Grand Jury.

(Endorsed:) No. 15,357. The State of Texas *vs.* Henry Clay Pierce. Indictment. Offense: False swearing. Filed in the District Court of Travis County, for the 53rd Judicial District this 1 day of Novr., A. D. 1906. Jas. P. Hart, Clerk District Court, Travis Co. Texas. By E. Huppertz, Deputy. Witnesses for the States: Miss N. H. Nagle, D. H. Hardy, Jefferson Co. Tex., J. P. Gruet.

Wherefore, your petitioner says that said arrest, restraint, detention and confinement is illegal, as set forth in the petition, and that the illegality thereof consists in this, to-wit:

First. It is not shown by any sufficient averments in the said Indictment that the facts stated or opinions expressed by petitioner in the affidavit set forth in said Indictment were false when the said affidavit was made, and hence the said Indictment charges no offense under the laws of the State of Texas. That so far as the averments of the said Indictment are concerned, the conclusion, judgment and opinion of petitioner expressed in the affidavit, are only alleged to be false in the conclusion, judgment and opinion of the Grand Jury preferring said Indictment.

Second. That the affidavit made by your petitioner was in the form prescribed by an Act of the Legislature of the State of Texas,

entitled "An act to prohibit pools, trusts, monopolies and conspiracies to control business and prices of articles; to prevent the formation or operation of pools, trusts, monopolies and combinations of charters of corporations that violate the terms of this Act, and to authorize the institution and prosecution of suits therefor," which was approved May 25th, 1899, and became effective January 31st, 1900, (Gen. Laws Texas, 1899, p. 246,) and that the language of said affidavit must be construed and interpreted in connection with the related text of the Act of which it forms a part; that the pools, trusts, combinations, conspiracies and monopolies prohibited by said Act were such only as were formed by such natural or artificial legal entities as were then engaged in business in the State of Texas and the Indictment does not show or charge that the Waters Pierce Oil Company, organized on May 29th, 1900, as stated by peti-
19 tioner in said affidavit, contrary to the fact stated by your petitioner in said affidavit, was a member of, or party to, any pool, trust, agreement, combination, confederation or understanding with any other corporation, partnership, individual, or any person, or association of persons, then or theretofore transacting or doing business in the State of Texas, for the purpose of fixing the price or limiting the output or quantity of any article or thing whatsoever to be sold or marketed in said State of Texas.

Third. That no charge of perjury or false swearing could legally be predicated upon any matter or thing stated *stated* in said affidavit, for the reason that the statements therein contained are mere expressions of legal conclusions or opinions upon a state of facts existent in the belief of the affiant.

Fourth. The affidavit being required by law, if false, could not be false swearing under the laws of the State of Texas.

Fifth. For that it appears upon the face of the said Indictment that more than four years elapsed between the date of the commission of the alleged offense and the finding of the said indictment.

And petitioner says that said arrest, detention and imprisonment is illegal for many other good and sufficient reasons.

Wherefore, your petitioner prays as in the petition herein, that he be wholly discharged and released from said custody and imprisonment, and for such other and further relief as to Your Honor may seem meet, and to law and justice shall appertain, and as in duty he will ever pray.

HENRY CLAY PIERCE, *Petitioner.*

20 STATE OF MISSOURI, *City of St. Louis, ss:*

Henry Clay Pierce being by me first duly sworn, upon oath says, that the matters and things stated in the foregoing petition are true to the best of his knowledge, information and belief.

HENRY CLAY PIERCE.

Subscribed and sworn to before me, this 9th day of May, 1907. My commission expires August 2d 1910.

[SEAL.] C. W. BLOCK,
Notary Public.

And afterwards to-wit: on the 15th day of May, A. D. 1907 the following among other proceedings were had and appear of record, in said cause, to-wit:

Judgment.

Before His Honor, Judge Adams.

5446.

In the Matter of HENRY CLAY PIERCE, Petitioner. *Habeas Corpus.*

Now at this day comes said petitioner in his own person and by his attorneys, in obedience to the recognizance heretofore entered into by him, and comes also the respondent, Edmond P. Creecy, Chief of Police of the City of St. Louis, by attorney, and this cause having been heretofore argued and submitted, the Court now being fully advised in the premises doth

Find and adjudge that said petitioner, Henry Clay Pierce, was, at the time of the issuance of the writ of *Habeas Corpus* herein, and is now lawfully restrained of his liberty by virtue of his arrest by said respondent under a warrant issued by the Governor of the State of Missouri bearing date of February 21st, A. D. 1907, said warrant being lawfully predicated upon a warrant issued by the Governor of the State of Texas bearing date of February 11" A. D. 1907 it is therefore

Ordered that said petitioner, Henry Clay Pierce be remanded into the custody of said respondent, and on motion of said petitioner by attorney it is Further Ordered that he be allowed until two
21 o'clock P. M. of this day to present his application for an appeal.

And thereupon to-wit: on the said 15th day of May, A. D. 1907, the following further proceedings were had and appear of record in said cause as follows, to-wit:

Order Granting Appeal.

5446.

In the Matter of HENRY CLAY PIERCE, Petitioner. *Habeas Corpus.*

Now comes said petitioner Henry Clay Pierce by his attorney and presents a bill of exceptions which is allowed, signed, sealed and ordered filed and made a part of the record herein, and said petitioner also files an assignment of errors and petition for appeal to the United States Supreme Court from the order and judgment entered herein, which appeal is allowed and it is ordered that a transcript of the record, papers and proceedings upon which said order and judgment was made be sent to the said Supreme Court.

It is further Ordered that such appeal operate as a supersedeas upon the petitioner giving a bond in the sum of $20,000.00 which

bond is now presented and approved by the Court, and it is ordered that said petitioner be discharged from the custody of respondent pending such appeal.

ELMER B. ADAMS,
United States Circuit Judge.

May 15th, 1907.

22 Which said Bill of Exceptions, Assignment of Errors, and Petition for Appeal and Bond are respectively in words and figures as follows, to-wit:

Bill of Exceptions.

In the Circuit Court of the United States Within and for the Eastern Division of the Eastern District of Missouri.

Petition. Habeas Corpus.

In re HENRY CLAY PIERCE, Petitioner,
v.
EDMOND P. CREECY.

Be it remembered that on the 8th day of May, 1907, the following petition was filed in the above cause, to-wit:
(See Page 4 of Transcript.)

And thereupon the following order was made, to-wit:
(See page 11 of transcript.)

And pursuant to said order the following writ was issued, towit:
(See page 11½ of transcript.)

And thereupon the following return to said writ was made by said Edmond P. Creecy, Chief of Police, etc.

To which return on the 10th day of May, 1907, the following answer of Henry Clay Pierce was filed.

The said cause coming on to be heard, the petitioner introduced in evidence the following duly certified papers—to-wit—
(See page 15 of transcript.)

The Court took the said cause under advisement & on the 15th day of May, 1907, ordered and adjudged that petitioner be remanded to the custody of Edmond P. Creecy, Chief of Police, under the warrant set forth in his return to the writ of *Habeas Corpus*, to which order and judgment the petitioner at the time duly excepted. Petitioner presents this his bill of exceptions and prays that the same may be signed, sealed and made a part of the record in this cause, which is done this May 15", 1907.

ELMER B. ADAMS, *Judge.* [SEAL.]

23 *Assignment of Errors.*

In the United States Circuit Court within and for the Eastern Division of the Eastern District of Missouri.

In re HENRY CLAY PIERCE, Petitioner,
vs.
EDMOND P. CREECY, Chief of Police, etc.

Comes now Henry Clay Pierce by his attorneys, and files the following assignment of errors:

1. The court erred in holding that the indictment, which was the only evidence of the existence of a charge of crime, contained any fundamental evidence of the crime of false swearing or perjury.

2. That the court erred in not holding that the language and terms of the affidavit upon which the pretended charge of false swearing was based was to be interpreted by the act of the Legislature of the State of Texas of 1899 entitled "An Act to Prohibit Pools, Trusts, Monopolies, and Conspiracies to Control Business and Prices of Articles; to prevent the formation or operation of pools, trusts, monopolies and combination of charters of corporations that violate the terms of this Act and to authorize the institution and prosecution of suits therefor" approved May 25th, 1899, (Gen. Laws of Texas, 1899, page 246) of which the form of the affidavit made by petitioner was a part and that as thus interpreted no offense is stated in and by said indictment.

3. The court erred in holding that an offense is charged in said pretended indictment.

4. The court erred in holding that the pretended offense was not discharged by the Statute of Limitations of the State of Texas.

5. The court erred in not holding that petitioner was held in violation of the Constitution and Laws of the United States and without being advised of the cause and nature of the accusation made against him.

24 6. The court erred in holding that false swearing or perjury could be judicially predicated upon anything stated in affidavit whereof petitioner is charged with false swearing, for that all of said matters so set forth in said affidavit and assigned as false swearing in and by said indictment are merely matters of opinion upon which a charge of false swearing could not be affirmed.

7. The court erred in holding that the pretended indictment contained under the laws of Texas any essential or fundamental charge of crime.

8. Because upon the whole record the petitioner should have been discharged.

H. S. PRIEST,
Attorney for Petitioner.

Petition for Appeal.

In re HENRY CLAY PIERCE, Petitioner, in *Habeas Corpus.*

The above named petitioner, Henry Clay Pierce, conceiving himself aggrieved by the order & judgment made and entered in the above entitled cause on this, the 15th day of May, 1907, wherein and whereby it was ordered and adjudged that he, the said Henry Clay Pierce, be remanded to the custody of Edmund P. Creecy, under the warrant set out in the return hereon, does hereby appeal from said order and judgment to the United States Supreme Court, for the reasons specified in the Assignment of Errors filed herein, and he prays that this appeal may be allowed, and that a transcript of the record, papers and proceedings upon which said order and judgment was made, duly authenticated, may be sent to the United States Supreme Court, and prays that said appeal may be operated as a supersedeas upon the petitioner giving a bond in such sum as may be fixed by this Court, conditioned upon the prosecution of said appeal and his appearance in the said United States Supreme Court, to abide whatever orders and judgment may be therein entered.

HENRY CLAY PIERCE,
By H. S. PRIEST,
His Attorney.

25 *Bond.*

In re HENRY CLAY PIERCE.

Proceedings in *Habeas Corpus.*

Know all men by these presents, That we, Henry Clay Pierce, as Principal, and Henry S. Priest as Surety, are held and firmly bound unto the United States of America to its use and to the use of any and all other parties who may be interested, in the full and just sum of Twenty Thousand Dollars, to be paid to the United States of America, to which payment well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally by these presents.

Sealed with our seals, and dated this 15" day of May, in the year of our Lord, One Thousand Nine Hundred and Seven.

Whereas, on the 8" day of May, 1907, at the April Term of the Circuit Court of the United States within and for the Eastern Division of the Eastern District of Missouri, in a proceeding in *Habeas Corpus*, wherein Henry Clay Pierce was petitioner, and directed to Edmund P. Creecy, defendant, a Writ of *Habeas Corpus* was granted, directing the said Edmund P. Creecy to produce the body of said Henry Clay Pierce before the said Court, on the 8th day of May, 1907, together with the cause of detention of said Henry Clay Pierce; and,

Whereas, upon the hearing of the cause of detention of said Henry Clay Pierce by said Edmund P. Creecy, on the 15th day of May, 1907, it was ordered and adjudged that the said petitioner be remanded to the custody of said Creecy; and,

26 Whereas, the said Henry Clay Pierce has obtained an order, granting an appeal from said order and judgment, to the Supreme Court of the United States, to reverse the same, and a citation directed to the said Edmund P. Creecy, citing and admonishing him to be and appear in the Supreme Court of the United States, at Washington, District of Columbia, to the October term, 1907, of the said Supreme Court of the United States; now

The condition of the above obligation is such that if said Henry Clay Pierce will appear in person or by attorney in the Supreme Court of the United States, on such day or days as may be appointed for the hearing of said cause in said Court and prosecute the said appeal, and shall abide by and obey all orders made by the Supreme Court of the United States in said cause, and shall surrender himself to abide the order and judgment appealed from, as said court may direct, if the said judgment and order against him shall be affirmed, and if he shall appear for trial in the Circuit Court of the United States on such day or days as may be appointed for the retrial by said Supreme Court and abide by and obey all orders made by said Court, provided the order and judgment against him shall be reversed by the Supreme Court of the United States, then the above obligation shall be void, otherwise to remain in full force, virtue and effect.

HENRY CLAY PIERCE. [SEAL.]
HENRY S. PRIEST. [SEAL.]

Approved

ELMER B. ADAMS,
Circuit Judge.

27 *Memorandum of Opinion.*

In the Circuit Court of the United States for the Eastern Division of the Eastern District of Missouri.

In the Matter of HENRY CLAY PIERCE, Petitioner.

By the *Habeas Corpus* Act.

Petitioner seeks to be discharged from an arrest made under a warrant issued by the Governor of Missouri, pursuant to a requisition made by the Governor of Texas, based upon an indictment charging him with the crime of false swearing as denounced by the statutes of Texas. The constitution and statutes of the United States, which authorize and regulate the proceedings in extradition (Article IV, Section 2 of the Constitution and Section 5278 R. S.) makes two fundamental facts essential to extradition, (1) the person sought to be extradited must have been

charged by some court of competent jurisdiction in the demanding state with some offense; (2) he must have fled from that state, and been found in another. No complaint is here made of the regularity of the proceedings to secure the warrant of arrest, and no claim is made that the petitioner did not, within the meaning of the law, flee; that is, depart from the State of Texas after the time he is alleged to have committed the offense in question. The sole ground for the petitioner's resistance to the warrant of arrest is that it does not appear that he has been charged with the commission of any offense in Texas, and to this question alone attention need be given.

On November 1, 1905, he was indicted by the Grand Jury of Travis County for the offense of false swearing, indictable under the laws of the State of Texas. The indictment charged him with having made on May 31, 1900, an affidavit wherein he swore among many other things which for the sake of perspicacity will be omitted, that the Waters-Pierce Oil Company, a corporation of Missouri, organized on May 29, 1900 of which he was president, was not
28 then, on May 31, 1900, "A party to" * * * "any agreement" * * * "or understanding with any other corporation," * * * "to regulate or fix the price of any article of manufacture" * * * and was not then "a party to" * * * "any agreement," * * * "to fix or limit the amount of supply or quantity of any article of manufacture" * * *"

The indictment falsifies the affidavit in two respects, among others. It charges in substance that on the 31st day of May, 1900, as well as at other times, the Waters-Pierce Oil Company was a party to an agreement with the Standard Oil Company of New Jersey, among others, to regulate and fix the price of petroleum and to fix and limit the amount of supply and quantity thereof, and that petroleum was an article of manufacture. The charge so made is found in a maze of words in connection with other charges that the corporation was in a "pool," "trust," "combination," "confederation," to fix the price and limit the product of manufacture and for other purposes. The indictment also charges that the Waters-Pierce Oil Company had been a member of such "pool," "trust," "Combination," "confederation" etc., for four months prior to the date of its incorporation.

Whatever strictures may be passed upon those features of the indictment falsifying the affidavit as to matters and things alleged to have occurred before the incorporation of the company, or whatever arguments may be drawn from the fact that the affidavit and indictment referred to "pools," "trusts," "combinations" and "confederations," etc., without setting forth the facts which constitute them, or without otherwise defining them, we are by force of the unequivocal language of the indictment brought to consider whether the charge that the petitioner made a false affidavit to the effect that on the day he made it, his company was not a party to any agreemen with any other company or person to fix the price or limit the product of petroleum, states an offense of false swearing within the purview of the Texas statute. Sec. 752 *et seq.* Code of Criminal Procedure, 1896.

Whatever may have been the high degree of certainty required in framing indictments at common law, it is now well settled that refinement and technicality must yield to substantial
29 things. The criterion for judging the sufficiency of indictments is whether the words employed make the charge clear to the "common understanding." (Dunbar *vs.* U. S., 156 U. S., 185.) "The object of criminal proceedings is to convict the guilty, as well as to shield the innocent, and no impracticable standards of particularity should be set up whereby the government may be entrapped into making allegations which it would be impossible to prove." Evans *vs.* United States, 153 U. S., 584, 591. "Few indictments * * * are so skillfully drawn as to be beyond the hypercriticism of astute counsel—few which might not be made more definite by additional allegations; but the true test is not whether it might possibly have been made more certain, but whether it contains every element of the offense intended to be charged, and sufficiently apprises the defendant of what he must be prepard to meet, and in case other proceedings are taken against him for a similar offense, whether the record shows with accuracy to what extent he may plead a former acquittal or conviction." Cochran *vs.* United States, 157 U. S., 286, 290.

Reasonable implications from facts clearly charged may be indulged in ascertaining the true meaning of an indictment. (Rosen *vs.* United States, 161 U. S., 30, 33; Clement *vs.* United States, — C. C. A., —; —— Fed. ——.)

Such are the more recent expressions of the Supreme Court of the United States on this question. They amount to this, that while every precaution must be taken to fairly and fully apprise the accused of the nature and cause of the accusation against him, so as to enable him to make his defense and plead the judgment which may be rendered in the case for his protection against another charge for the same offense, and thereby protect him to the full in his constitutional right to a fair and impartial trial, no impracticable or useless standards of technicality or refinement, which tend to defeat justice or embarrass its administration, should be adopted. Such is also the statutory law of Texas. "An indictment for any offense against the penal laws of this state shall be deemed sufficient which charges the commission of the offense in ordinary and concise lan-
guage in such a manner as to enable a person of common un-
30 derstanding to know what is meant." * * * (Article 448 Penal Code of Texas) and in Texas indictments may be amended by leave of Court in all matters of form (Articles 587 and 588 Penal Code).

In the light of the foregoing controlling and reasonable rules it would seem that if a president of a corporation, whose duty it was as its chief executive officer to know what kind of agreements his company had made, should, pursuant to a law requiring him to do so, make an affidavit that his company was not on a given day a party to an agreement with any other company to fix the price or limit the production of an article of manufacture, the affiant could hardly say, when charged with false swearing in that particular,

that he could not understand the nature of the charge; that its meaning was not apparent to common understanding; that it was only the expression of an opinion without knowledge of its meaning, when taken in connection with the law governing the same. There might be force in the argument of petitioner's counsel that the charge is based on a mere expression of opinion, and not on facts, if affiant had sworn as to the meaning or legal significance of some existing agreement or contract; but such is not the case. He swore to the fact this company had no agreement whatsoever with any other corporations or persons, fixing the price or limiting the product of a manufactured article. It is not apparent how that single fact could be amplified by any statement of the terms of an agreement, when the existence itself of any such agreement is denied in toto. The indictment in the particulars just discussed in my opinion states the substance of an offense within the meaning of the extradition laws of the United States.

It is true it employs some useless verbiage; is intricate and involved in its attempt at comprehensiveness; states and must stand on the somewhat improbable assertion that the company, whose corporate existence ante-dated the affidavit only by two days, did all the iniquity charged against it within that time. But none of these considerations can be entertained or their effect adjudicated in this proceedings by *habeas corpus*. Let it once be conceded or determined that the substance of an offense is stated in the indictment, however inartificially it may be done, or however involved
31 with immaterial or incompetent matters it may be; all other questions affecting the proceedings or the merits of the case must be relegated to the consideration and final adjudication of the courts of the demanding State. Those courts are conclusively presumed to administer the law of the land, and will discharge their duty with fairness and impartiality to the petitioner as well as to the State. Such is the firmly settled rule from which this court cannot depart. *Ex parte* Reggel, 114, U. S., 642, 651; Pearce *v.* Texas, 155 U. S. 311, 313; Whitten *v.* Tomlinson, 160 U. S. 231; Benson *v.* Henkel, 198 U. S., 1, 11; Hyde *v.* Shine 199 U. S. 62, 83; Pettibone *v.* Nichols 203 U. S., 192; Davis' case, 122 Mass., 324; *Ex parte* Pearce, 32 Texas Crim. Rep., 301.

Testing the indictment in another way the same result follows. The charges contained in it include two at least which show the substantial elements of the offense of false swearing, and within the rule laid down in Stewart *vs.* United States, 119 Fed. 93, and *In re* Green, 32 Fed. 106, specially relied upon by petitioner's counsel, it cannot be said that the indictment is essentially and fundamentally defective. If the petitioner, without any motion to quash, or other attack upon the indictment, had entered a plea of not guilty, gone to trial and suffered a conviction, it could not be successfully contended that a motion in arrest interposing for the first time an objection to the sufficiency of the indictment would have been sustained, (Stat. of Jeofail, Sec. 464 Code Crim. Proc.) or that such judgment *of* conviction would have been absolutely void. There is too much substance in the indictment, notwithstanding much surplusage, to jus-

tify such a conclusion. If the indictment would not have been void on a motion in arrest, it must be held good as against the present collateral attack.

It is argued that because the indictment was not found within three years after the commission of the offense prosecution for it is barred by the statute of limitations, which is three years. (Article
32 218, Code Crim. Proc.) That argument is without merit. The statute constitutes a defens to be availed of at the option of an accused person, and one which may or may not be good. It may turn out to be true that the petitioner has been absent from the state of Texas during a part of the time since 1900. If so the duration of such absence would not be included in the period of limitation. (Article 221, Code Crim. Proc.)

After a careful consideration of the able argument of counsel for both sides, the conclusion is irresistible that the substance of an offense is found in the indictment, and that jurisdiction rests alone with the courts of the demanding State to pass upon any question which may arise in its consideration and trial.

The prisoner must be remanded and it is so ordered.

33 UNITED STATES OF AMERICA,
Eastern Division of the Eastern Judicial District of Missouri, ss:

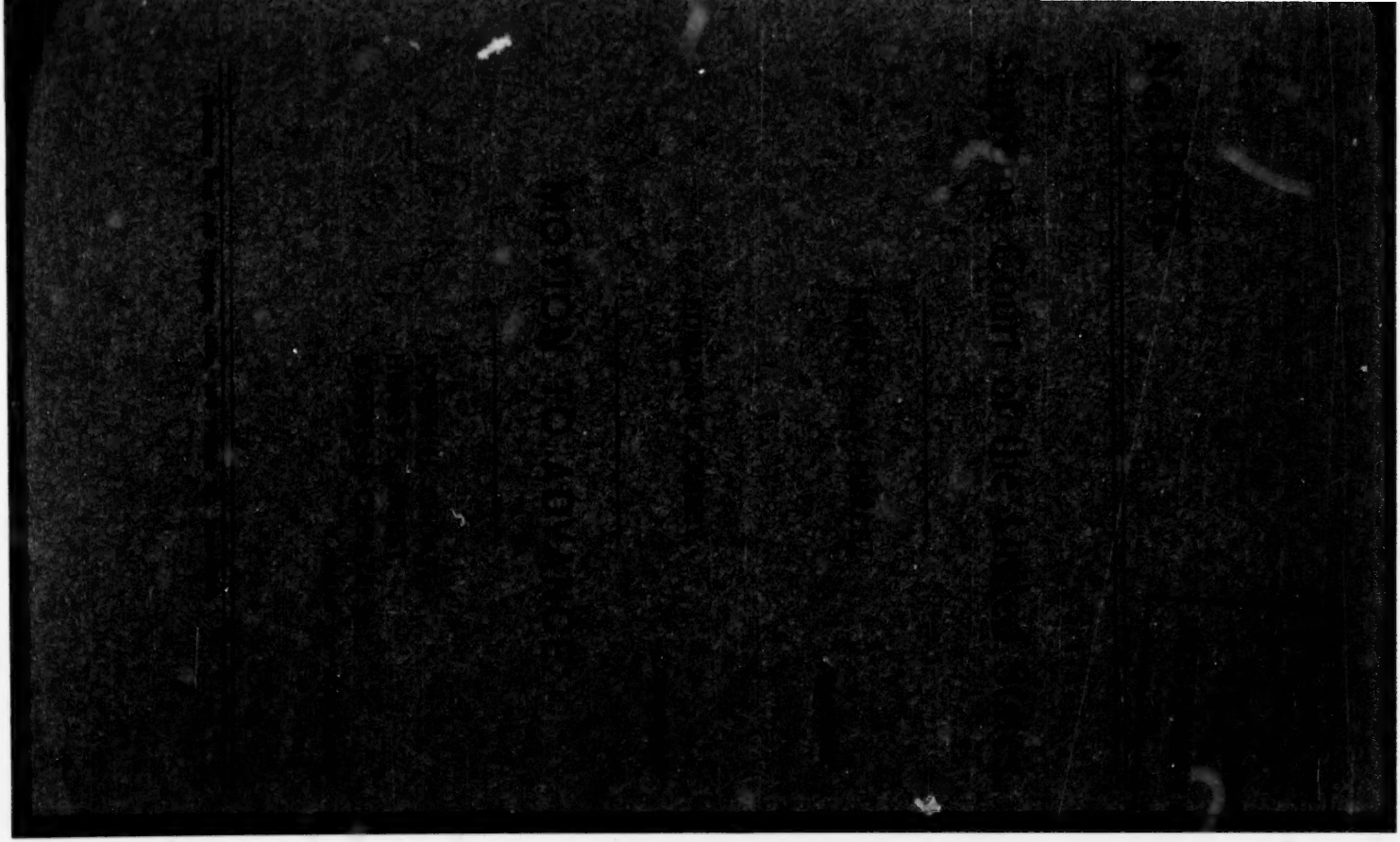
I, James R. Gray, Clerk of the Circuit Court of the United States, in and for the Eastern Division of the Eastern Judicial District of Missouri, do hereby certify that the writing hereto attached is a full, true, and complete transcript of the record and proceedings in the matter of petition for *habeas corpus* of Henry Clay Pierce, No. 5446, as fully as the same remains on file and of record in said case in my office, and that the original citation is hereto attached, and herewith returned.

In witness whereof, I hereunto subscribe my name and affix the seal of said Court, at office, in the City of St. Louis, in the Eastern Division of the said District, this fifth day of June, A. D. 1907.

JAMES R. GRAY,
Clerk of said Court.

34 [Endorsed:] No. 5446. United States Circuit Court, Eastern Division of the Eastern Judicial District of Missouri. In the Matter of Henry Clay Pierce, Petitioner. (*Habeas Corpus.*) Transcript of Record and proceedings.

Endorsed on cover: File No. 20760. E. Missouri C. C. U. S. Term No. 357. Henry Clay Pierce, appellant, *vs.* Edmund P. Creecy, chief of police of the city of St. Louis. Filed June 14, 1907. File No. 20760.



IN THE

Supreme Court of the United States.

HENRY CLAY PIERCE, Appellant, v. EDMUND P. CREECY, Appellee.	October Term, 1907. No. 357.

To Messrs. BARCLAY & FAUNTLEROY:

Please take notice that the Appellant in the above cause will, on Monday, March 30th, 1908, or as soon thereafter as counsel can be heard, move the Court to advance the hearing of the above case.

JOSEPH H. CHOATE,
H. S. PRIEST,
Attorneys for Appellant.

ST. LOUIS, MO. March 16th, 1908.

Service of above motion is hereby accepted and all exceptions as to time waived.

SHEPARD BARCLAY,
THOMAS T. FAUNTLEROY,
Attorneys for Appellee.

IN THE

SUPREME COURT OF THE UNITED STATES.

HENRY CLAY PIERCE, Appellant, v. EDMUND P. CREECY, Appellee.	October Term, 1907. No. 357.

Motion to Advance.

The appellant hereby moves this Honorable Court upon the record, and upon all the proceedings herein, to advance this cause upon the docket of the Court for the October Term, 1907, and to set the same for argument at as early a date as may be convenient to the Court.

Washington, D. C., 30th day of March, 1908.

JOSEPH H. CHOATE,
HENRY S. PRIEST,
JOSEPH H. CHOATE, Junior,
Of Counsel for Appellant.

IN THE

SUPREME COURT OF THE UNITED STATES.

HENRY CLAY PIERCE, Appellant, v. EDMUND P. CREECY, Appellee.	October Term, 1907. No. 357.

BRIEF OF APPELLANT ON MOTION TO ADVANCE.

Statement.

This is an appeal from a judgment of the Circuit Court of the United States discharging a writ of *habeas corpus* and remanding the appellant to the custody of the appellee, by whom he had been arrested upon a warrant of interstate extradition. The facts are briefly as follows:

The appellant was arrested and taken into custody by the appellee as Chief of Police of the City of St. Louis, Missouri, on May 8, 1907, under a warrant of extradition issued on February 21, 1907, by the Governor of Missouri, in response to a requisition made upon him by the Governor of Texas on February 11, 1907, which requisition was based upon an alleged indictment recited therein.

This indictment (a copy of which is hereto annexed) purported to charge the appellant with the statutory crime of false swearing. This offense was alleged to have been committed in an affidavit sworn to by the appellant in Texas nearly six years

before, which was set forth in full in the indictment (Record, pp. 3–8). The affidavit was sworn to by the appellant as president of the Waters-Pierce Oil Company, a Missouri corporation organized only two days before the date of the affidavit. It asserted that during the preceding three months the Waters-Pierce Oil Company had not—among an immense variety of other things—

> " created, entered into, or became a party to any pool, trust, agreement, combination, confederation or understanding, with any other corporation, partnership, individual or any other person or association of persons "

to fix the prices or limit the output of anything whatsoever, and also that it had not

> " issued, and does not own, any trust certificates for any corporation "

or combination, the effect or purpose of which would be to fix prices, limit production, create a monopoly, as defined in Sections 2, 3, 4, 5, 6, 10 and 11 of " this Act " (Record, p 5). What " this Act " may be, nowhere appears.

The indictment then proceeds to aver that the affidavit was false in that on every day of the three months (during only two of which days the company, as appeared by the uncontradicted portion of the affidavit, had been in existence) the Waters-Pierce Oil Company had committed most of the very numerous acts denied in the affidavit. This averment is absolutely general. No details are given, except that agreements are alleged to have been entered into with the Standard Oil Companies and some of their officers. No one of these alleged agreements is particularized by the date, place, subject, or effect, or by the names of the agents through whom the companies acted. Nothing in the entire indictment serves to identify any of an infinite number of possible transactions as that in respect to which the affidavit was false. Nowhere

does it appear therein what may have been meant by "trust certificates," or by the "conspiracy to defraud" or "monopoly" as defined by the provisions of the mysterious "this act," which were to be effected by means of the trust certificates.

On the day of his arrest the appellant presented in the Circuit Court of the United States for the Eastern Division of the Southern District of Missouri, to the Hon. E. B. Adams, Circuit Judge, his petition for a writ of *habeas corpus* (Record, p. 2), alleging that he was restrained of his liberty by the appellee, in violation of the Constitution and laws of the United States. This petition alleged that the arrest was illegal, because the issue of the warrant of extradition on which it was based was not authorized by the Constitution of the United States (Art. 4, Sec. 2), or by the statutes enacted in execution thereof (U. S. R. S., § 5278), which are the sole sources of the power to issue such warrants or to arrest citizens for extradition. The particular defect pointed out was that while the constitutional and statutory provisions authorize the extradition only of persons charged with crime, the appellant was not, within the true meaning of those provisions, a person charged with crime. The petition alleged that the indictment set forth in the requisition was not, within the meaning of the Constitution, a charge of crime, and was void under the Constitution of the United States and the laws of Texas for the following reasons (Record, pp. 7, 8):

(1.) The assignments are insufficient. They deny the truth of the affidavit in such general terms that they neither enable the accused to prepare his defense, nor inform him with sufficient certainty of the nature of the charge against him.

(2.) The affidavit, being in the form required by General Laws of Texas, 1899, page 246, must be construed as relating to that act, which prohibits only combinations between corporations or individuals engaged in business in Texas. The indictment

does not charge that the Waters-Pierce Company was combining with any such corporation or individuals.

(3.) The matters sworn to in the affidavit are such as cannot form the basis of a charge of perjury or false swearing. The statements alleged to be false are mere legal conclusions, opinions and beliefs.

(4) The affidavit was required by law, and therefore even if it was false the offense was not that of false swearing.

(5.) The indictment itself shows that the Statute of Limitations has run, whereas in Texas an indictment is absolutely void, even after conviction, unless it shows affirmatively on its face that the statute has not run.

Upon this petition a writ of *habeas corpus* was issued (Record, p. 10), a return was made by the respondent (Record, p. 11), an answer to the return was filed by the appellant (Record, p. 12), a hearing was had, and finally a judgment or order was rendered as aforesaid remanding the appellant. This is the judgment appealed from.

Thereupon the appellant, believing that the case was within the Fifth Section of the Act of March 3, 1891, which authorized appeals to be taken from the Circuit Court to the Supreme Court direct in any case which involves the construction or application of the Constitution of the United States, prayed and was granted the present appeal to this Court, and was released upon the usual bond.

Thereafter, being uncertain as to the correctness of this procedure and realizing that before this Court would ordinarily reach the case the time within which an appeal could be taken to the Circuit Court of Appeals would have expired, the appellant prayed and was granted a second and subsequent and separate appeal to the Circuit Court of Appeals

for the Eighth Circuit, and filed a bill of exceptions and assignment of errors thereon.

On December 7, 1907, before the case came on to be heard in the Circuit Court of Appeals, the appellant filed in that Court a motion setting forth the aforesaid facts in connection with the two appeals and praying in the alternative either for a continuance until the Supreme Court should have passed upon the direct appeal, or that the record be certified up to the Supreme Court, or that the appellant have a reasonable time to apply to the Supreme Court for a writ of *certiorari*. This motion having been opposed, the Circuit Court of Appeals, after hearing argument upon both sides, continued the cause until the May Term, setting it down peremptorily for the first day of the term on condition that the appellant would make immediate application to this Court for a writ of *certiorari*. Thereafter, and on the twenty-seventh day of January, 1908, the appellant presented his petition for a writ of *certiorari* to this Court. This application, however, was denied.

It, therefore, appears that the period of continuance granted by the Circuit Court of Appeals will undoubtedly expire before this appeal, unless it be advanced, can be heard.

Reasons for this Application.

1.

Whether or not this case is technically a criminal case within the meaning of the 26th rule of this Court the situation of the appellant is plainly within the spirit of that rule. He is at liberty, but only under heavy bail bonds, and the adverse decision appealed from will, unless reversed, require his removal to a distant and probably unfriendly jurisdiction, and subject him to prosecution there. His

position is exactly similar to that which exists in the ordinary criminal case, where the appellant, after conviction, has been released on bail pending the appeal. The same considerations of justice and expediency which induce the Court to expedite the decision of the ordinary criminal appeal should also lead to the granting of the present application.

2.

The question presented is of great public interest and importance.

The practical result of the rule laid down in the opinion of Adams, *J.*, in the Court below, is to permit the extradition of any citizen of the United States upon a paper which bears merely the semblance of an indictment. If that doctrine be sound the Governor of a State may issue a warrant, and the Federal court must refuse to interfere with his action, although the indictment on which the warrant is based is so plainly bad that, as Lacombe, *J.*, said, in *In re* Terrell, 51 Fed., 213, the Judge can see

> "from the face of the indictment that were such indictment before him for trial and demurred to he would quash it."

The enforcement of such a rule would leave absolutely without remedy every person against whom extradition proceedings were brought, in which the warrant was based upon a paper purporting to be, and authenticated as, an indictment, although a mere inspection of the paper itself might plainly disclose the fact that no valid conviction could possibly be based upon it. The viciousness of this doctrine was forcibly stated in *In re* Terrell, *supra*, where the Court said:

> "This is a country of vast extent, and it would be a grave abuse of the rights of the citizen if, when charged with alleged offenses,

committed perhaps in some place he had never visited, he were removable to a district thousands of miles from his home to answer to an indictment fatally defective, on any mere theory of a comity which would require the sufficiency of the indictment to be tested only in the particular court in which it is pending."

The question here propounded is whether no remedy against this abuse exists? A question of more nearly universal interest is rarely raised. It clearly requires, and is entitled to, a speedy decision by this Court.

3.

The case presents an unsettled question of the jurisdiction of this Court, and one which, unless this application be granted, may be so decided by the Circuit Court of Appeals as to deprive the appellant of the right to be heard here. The case originally seemed to counsel to present in the Circuit Court two grounds of Federal jurisdiction—the question of the construction and application of the Constitution, and the question of the construction of the statute (U. S. R. S., § 5278). If both grounds existed there was a right of appeal to either court (*Mississippi R. R. Com.* v. *Illinois Central Co.*, 203 U. S., 335; *Field* v. *Asphalt Co.*, 194 U. S., 618). If one ground only existed, then there was a right of appeal to one court only. It was deemed impossible for counsel to determine positively that the court to which the case should finally be presented would not hold that only one of the grounds of jurisdiction really existed. If so the decision might readily be that the ground which did exist gave an appeal only to the other court. Counsel accordingly dared not risk the taking of one appeal, but relying on the fact that this Court had without express disapproval permitted the practice (*Pullman Co.* v. *Central Co.*, 171

U. S., 138) took two appeals, first to this court, then to the Circuit Court of Appeals. The latter court having refused to continue the cause to await the action of the Supreme Court, and having set it down peremptorily for the May Term, will presumably decide it on the merits. If so the decision, involving no pecuniary value, will not be appealable (*Whitney* v. *Dick*, 202 U. S., 132), and after it has been rendered this Court will apparently not consider the present direct appeal (*Robinson* v. *Caldwell*, 165 U. S., 359). Unless, therefore, this Court shall take under advisement, this question of appellate jurisdiction before the case is heard in the lower court, the decision of the latter, should it hold that it had power to entertain the appeal, will cut off absolutely the appellant's right to be heard here. This would apparently be so even if both courts should be of opinion that the appellant originally was and now is clearly entitled to his direct appeal to the Supreme Court. In a case involving the personal liberty of the appellant the right to be heard by the ultimate court is of immense importance, and is one of which no lower tribunal should be allowed to deprive him; nor should any litigant be finally concluded as to a question of the jurisdiction of the Supreme Court, except by the decision of that court itself.

The appellant cannot now insure the avoidance of this result by any action of his own. He can, of course, move to withdraw his appeal to the Circuit Court of Appeals but such motions are not granted as of right (*Donallan* v. *Tannage Co.*, 79 Fed. R., 385). Moreover, the abandonment of that appeal would involve the risk that the Supreme Court, when it came to consider the case, might hold that the sole lawful appeal was that which had been abandoned. The seriousness of that risk is obvious, and we feel strongly that the appellant should not be called upon to assume it merely because in the then existing state of the decisions his counsel

were unable to give positive advice as to whether the appeal lay in the first instance to the Circuit Court of Appeals, or to this Court. We have heretofore taken every possible step, except the present application, to get this question of appellate jurisdiction settled in such a way as will not risk the forfeiture of the appellant's indubitable right to have his appeal heard on the merits in one court or in the other. We have moved in the Circuit Court of Appeals for a continuance pending the decision by this Court; we have moved to have the record certified up to this Court; and we have applied to this Court for a writ of *certiorari* to the Circuit Court of Appeals. There has been no delay, except such as was necessary for the consideration demanded by the importance of the case, between the making of any of these motions, or since the last of them. All of the applications having been denied, we now respectfully request that this Court will advance the hearing of the present appeal setting it down for argument, if possible, at such a date that it may be heard before the first day of the May Term of the Circuit Court of Appeals for the Eighth Circuit.

JOSEPH H. CHOATE,
H. S. PRIEST,
JOSEPH H. CHOATE, JR.,
Of Counsel.

APPENDIX.

Copy of Indictment referred to in above Brief.

IN THE NAME AND BY THE AUTHORITY OF THE STATE OF TEXAS.

The Grand Jurors of Travis County, in said State duly empanneled, sworn and charged as such at the September Term A. D. 1906 of the District Court of said County, in and for the 53rd. Judicial District, upon their oaths, in said court present: That Henry Clay Pierce, in said County and State, on or about the 31st. day of May in the year of our Lord. Nineteen hundred, and before the presentment of this indictment, did then and there present himself and make his personal appearance before N. H. Nagle, a duly and legally qualified and acting Notary Public within and for the County of Travis and State of Texas, who was then and there duly authorized by law as such officer and Notary Public to administer an oath; and the said Henry Clay Pierce, having been duly sworn by the said N. H. Nagle, acting in her capacity as such officer and Notary Public did then and there unlawfully, deliberately, corruptly and wilfully, under the sanction of the oath so legally administered to him by the said N. H. Nagle, acting in the capacity aforesaid, make his voluntary false statement and declaration in writing as follows:

AFFIDAVIT.

THE STATE OF TEXAS,
County of Travis:

I, HENRY CLAY PIERCE, do solemnly swear that I am the President, (President, Secretary, Treasurer or director) of the corporation known and styled Waters Pierce Oil Company, duly incorporated

under the laws of Missouri, on the 29th. day of May, 1900, and now transacting or conducting business in the State of Texas, and that I am duly authorized to represent said corporation in making this affidavit, and I do further solemnly swear that the said Waters Pierce Oil Company, known and styled as aforesaid, has not, since the 31st. day of January, 1900, created, entered into or become a member of or a party to, and was not on the 31st. day of January, 1900, nor at any date since that date, and is not now a member of or a party to any pool, trust, agreement, combination, confederation or understanding, with any other corporation, partnership, individual, or any other person or association of persons, to regulate or fix the price of any article of manufacture, mechanism, merchandise, commodity, convenience, repair, any product of mining, or any article or thing whatsoever, or the price or premium to be paid for insuring property against loss or damage by fire, lightning, storm, cyclone, tornado, or any other kind of a policy issued by the parties aforesaid, and that it has not entered into or become a member of, or a party to, any pool, trust, agreement, contract, combination or confederation, to fix or limit the amount or supply or quantity of any article of manufacture, mechanism, merchandise, commodity, convenience, repair, or any product of mining, or any article or thing whatsoever, or the price or premium to be paid for insuring property against loss or damage by fire, lightning, storm, cyclone, tornado, or any other kind of policy issued by the parties aforesaid; and that it has not issued, and does not own any trust certificates for any corporation, agent, officer or employe, or for the directors or stockholders of any corporation, has not entered into and is not now in any combination, contract or agreement with any person or persons, corporation or corporations, or with any stockholders, or directors thereof, the purpose and effect of which said combination,

contract or agreement would be to place the management or control of such combination or combinations, or the manufactured product thereof, in the hands of any trustee or trustees, with the intent to limit or fix the price, or lessen the production and sale of any article of commerce, use or consumption, or to prevent, restrict or diminish the manufacture or output of any such article; that it has not entered into any conspiracy, defined in the preceding sections of this act, to form or secure a trust or monopoly in restraint of trade; that it has not been since January 31, A. D. 1900, and is not now a monopoly by reason of any conduct on its part which would constitute it a monopoly under the provisions of sections 2, 3, 4, 5, 6, 10 and 11, of this act, and is not the owner or lessee of any patent to any machinery intended, used or designed for manufacturing any raw material or preparing the same for market by any wrapping, baling or any process, and while leasing, renting or operating the same refuses or fails to put the same on the market for sale; that it has not issued, and does not own any trust certificates, and has not, for any corporation or any agent, officer or employe thereof, or for the directors or stockholders thereof, entered into, and is not now in any combination, contract, or agreement with any person or persons, corporation or corporations, or with the stockholders, director or any officer, agent or employe of any corporation or corporations, the purpose and effect of which combination, contract or agreement would be a conspiracy to defraud, as defined in Section 1 of the Act, or to create a monopoly, as defined in Sections 2, 3, 4, 5, 6, 10 and 11 of this Act.

HENRY CLAY PIERCE.
(President, Secretary, Treasurer or Director.)

Subscribed and sworn to before me, a Notary Public within and for the County of Travis,
, this 31st. day of May, 1900.

(Signed) N. H. NAGLE,
[SEAL.] Notary Public.

Whereas, in truth and in fact the said Waters Pierce Oil Company, mentioned in the above false statement and declaration in writing, had since the 31st day of January, 1900, created, entered into and become a member of and a party to and was on the 31st day of January, 1900, and on every day since that date up to and on the 31st day of May, 1900, a party to a pool, trust, agreement, combination, confederation, and undertaking with other corporations, individuals, and other persons and association of persons, to wit:

With the Standard Oil Company of New Jersey, a corporation incorporated under the laws of New Jersey, and with all of the Standard Oil Companies of the United States, the names and description of said companies being to said Grand Jurors unknown after diligent inquiry, and with John D. Rockefeller, John D. Archbold, H. H. Rogers and other individuals and persons whose names and a description of is to said Grand Jurors unknown after diligent inquiry, to regulate and fix the price of petroleum and all of the products of petroleum, the said petroleum and all the products of petroleum being article of manufacture and a commodity and a convenience and a product of mining and an article and a thing; and whereas in truth and in fact the said Waters Pierce Oil Company, hereinbefore mentioned, had since the 31st day of January, 1900, created, entered into and become a member of and a party to and was on the 31st day of January, 1900, and on every day since the 31st day of January, 1900, up to and on the 31st day of May, 1900, then and there a member of and a party to a pool, trust agreement, combination, confederation and undertaking with other corporations, individuals, and other persons and associations of persons to-wit: With the Standard Oil Company of New Jersey a corporation incorporated under the laws of the State of New Jersey, and with all the Standard Oil Companies of the United States, the

names and description of said companies, being to the said Grand Jurors unknown after diligent inquiry, and with John D. Rockefeller, John D. Archbold, H. H. Rogers, and other individuals and persons whose names and a description of are to said Grand Jurors unknown after diligent inquiry, to fix and limit the amount of supply and quantity of petroleum and all of the products of petroleum, the said petroleum and all of the products of petroleum being articles of manufacture and a commodity and a convenience and a product of mining and article and a thing; whereas in truth and in fact the said Waters Pierce Oil Company, hereinbefore mentioned, had since the 31st day of January, 1900, and on every day since said 31st day of January, 1900, up to the 31st day of May issued and did then and there on the 31st day of May, 1900, issue trust certificates to another corporation, to-wit: the Standard Oil Company of New Jersey, hereinbefore described, its agent, officer and employe, to wit, one J. P. Gruet, and one John D. Johnson, and other agents and officers and employees of said Standard Oil Company of New Jersey, whose names and descriptions are to said Grand Jurors unknown after diligent inquiry; whereby the said Standard Oil Company of New Jersey then and there became the owner of the majority of all the shares of stock of the said Waters Pierce Oil Company and the owner of a controlling interest in said company.

Against the peace and dignity of the State.

JEFFERSON JOHNSON,
Foreman of the Grand Jury.

Office Supreme Court, U. S.
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JAMES H. McKENNEY,
CLERK.

Supreme Court of the United States

OCTOBER TERM, 1907

No. 357

HENRY CLAY PIERCE, *Appellant*

vs.

E. P. CREECY, Chief of Police, *Appellee*

SUGGESTIONS ON BEHALF OF THE STATE OF TEXAS UPON APPELLANT'S MOTION TO ADVANCE CAUSE FOR HEARING

F. J. McCORD
Assistant Attorney General of Texas,

THOMAS T. FAUNTLEROY
SHEPARD BARCLAY
Counsel for Appellee and for the State of Texas

Supreme Court of the United States

OCTOBER TERM, 1907

No. 357

HENRY CLAY PIERCE, *Appellant*

vs.

E. P. CREECY, Chief of Police, *Appellee*

SUGGESTIONS ON BEHALF OF THE STATE OF TEXAS UPON APPELLANT'S MOTION TO ADVANCE CAUSE FOR HEARING

On behalf of the **State of Texas,** for whom Appellee as CHIEF OF POLICE claims custody of the petitioner, under the extradition proceedings in question, we wish to submit these suggestions upon Appellant's **Motion to Advance,** which has been noticed for submission to this Honorable Court.

For Appellee we agree that the cause should be advanced for hearing, but our concurrence is **upon different grounds** from those assigned in the Brief of learned counsel for Appellant.

We respectfully request that the hearing be set at an early date, during the **present** (October) **term,** 1907,

because the delay which has resulted from the proceedings to intercept the process of extradition has already been prolonged, and should not be further continued beyond the time actually necessary to permit a proper hearing of one of the appeals of the petitioner upon its merits or demerits.

The main facts in the progress of the initial proceeding to which the Habeas Corpus case refers and in this cause itself are as follows:

Nov. 1, 1906, **Petitioner was indicted** for false swearing by the Grand Jury, Travis County, Texas, (Printed Record, p. 4).

Feb. 11, 1907, GOVERNOR CAMPBELL of Texas issued a **requisition** to GOVERNOR FOLK of Missouri for surrender of petitioner under the Constitution and laws of the United States (Printed Record, p. 13).

Feb. 21, 1907, Governor FOLK of Missouri issued **warrant** (in usual form) **for arrest** and delivery of petitioner to G. S. MATHEWS, agent of Texas therefor (Printed Record, p. 12).

May 8, 1907, Petition for *Habeas Corpus* by petitioner to Hon. ELMER B. ADAMS, Circuit Judge (Printed Record, pp. 2-9).

Writ issued, and return thereto by E. P. CREECY, as Chief of Police of St. Louis (Record, pp. 11-12).

May 10, 1907, Cause heard and submitted (Record, p. 21).

May 15, 1907, **Petitioner remanded** by the Circuit Judge (Record, p. 19). Opinion filed (Record, p. 24), reported, 155 Fed. 663.

May 15, 1907, Appeal allowed to petitioner to Supreme Court (Record, p. 32).

May 15, 1907, Appeal allowed to petitioner to U. S. *Court of Appeals*, 8th Circuit (Record, p. 20).

Dec. 17, 1907, Cause in U. S. Court of Appeals continued, **on motion of petitioner,** until May Term, 1908, to permit petitioner to make **"an immediate application** to the Supreme Court of the United States for a writ of *certiorari*", etc. (Record, p. 32).

January, 1908, Petition in Supreme Court for *certiorari*.

Feb. 3, 1908, *Certiorari* denied by Supreme Court.

Nearly **a year and a half** have passed since the indictment in the principal case was found.

[The *Record* referred to above is that on file in the *certiorari* case; in the case at bar the record has not yet been printed.]

The State of Texas, on behalf of the Appellee, E. P. Creecy, *Chief of Police*, in whose custody the petitioner is supposed to repose, pending these proceedings, is **extremely desirous** to have its laws properly applied to the case of the petitioner, with due regard for all his rights, but without **any more delay** than is necessary to satisfy the requirements of federal jurisdiction.

In the Brief filed for the Appellee upon the application for *certiorari* recently, in this Court, it was sought to be shown that the case involved **Texas law** and that **only;** but, whatever the appeal in this Court may involve, it should be heard, we respectfully submit, as promptly as the principles of procedure applied in this Court will permit.

The State of Texas requests that the cause be heard as soon as is consistent with the practice of this Court.

In the Brief of Appellant's learned counsel on his **motion to advance,** we find an extremely interesting and ingenious argument of the supposed merits of the case generally, which discussion might possibly be deemed irrelevant but for the eminence and ability of learned counsel which forbid such a suggestion.

We must be pardoned, however, for not following far into that field of discussion.

At the proper time we shall hope to be fully heard in support of our contention that there is **nothing whatever** involved in the appeal or in the cause except the proper **application and construction of the laws of Texas** regarding the sufficiency of the indictment on which the extradition proceedings are based.

That, we consider a question **peculiarly within the jurisdiction of the courts of Texas** to determine in the first instance (subject to all rights of review) it being well settled by decisions of this Court that the judicial authority of that State should first be permitted to decide such questions, **even where a federal right is involved,** and that, secondly, even if the extradition is claimed upon insufficient documents, the party extradited might yet be tried upon an **amended** or a **new indictment,** or he might even be tried upon a **totally different charge** from that upon which he was extradited; the international rule (requiring in such cases a different practice in extradition between independent nations) **not being applicable** to the extradition of parties accused of crime in the several States of the American Union, by virtue of the terms of the Federal Constitution which it is well to keep clearly in mind (Art. 4, Sec. 2):

"A person charged in any State with treason, felony or other crime, who shall flee from justice and be found in another State, shall, on demand of the executive authority of the State from which he fled, be delivered up to be removed to the State having jurisdiction of the crime."

Neither the above section nor the Federal legislation thereunder is obscure or uncertain in its construction or in its application to the facts presented by the petition for *Habeas Corpus* in this case.

The specific assignments of supposed defects in the original indictment, as they are recited in the learned Brief for Appellant on this **motion** (pp. 5–6) exhibit a fatal want of any substantial question of a Federal nature, and demonstrate that the issues raised upon the indictment are purely of **construction and interpretation of the laws of Texas,** and not of the United States. There is nothing presented which is cognizable in the Federal jurisdiction upon *Habeas Corpus*, at this stage of the State proceedings. The decisions of this Court so declare, as we shall show if occasion for their citation shall arise.

The charge involved in the Texas indictment is for an act **done in that State,** namely, the filing of an affidavit there, whereby Appellant was brought within the proper sphere of jurisdiction of the Texas laws applying to such an act. A Court of that State is attempting to bring Appellant to trial on account of that act, applying the recognized procedure provided therefor by Federal law in the form of interstate extradition process. We have claimed, in our Brief on the application here for *certiorari* (at this Term) that the petition for *Habeas Corpus* presents no Federal question whatso-

ever, no construction, intrepretation or application of the Federal Constitution being involved, nor any question of jurisdiction of the Circuit Court which **assumed jurisdiction** and **exercised it** by remanding the petitioner. But whatever views thereof we have to submit, we are glad to be able **to second** the **Motion to Advance** presented by learned counsel for Appellant.

This appeal bears so directly on the progress and regular course of the **criminal cause** itself, in the court of first instance, as to warrant treating it as an ancillary feature thereof for the purpose of invoking a speedy hearing and determination thereof.

The "*delay*" which the learned counsel for Appellant deprecate in their Brief (p. 11) we trust may soon be at an end, so that any substantial features which this appeal may possess can be reached and decided. The State of Texas and its proper officers will do all in their power to promote an early decision of the matters in question, so that the irritating influence of any further "delay" may be removed as to all parties concerned.

We respectfully ask on behalf of the STATE OF TEXAS and of the appellee that the **motion to advance** be sustained, and the appeal be set for **a hearing at an early day of this Term.** To that end we **waive other notice,** and **consent** to a **special setting** of the cause in the week beginning **April 20th** or sooner, so that there may be no cause for regret on the part of Appellant or of his able counsel at further delay. The printed records of the proceedings below (as filed herein by Appellant in the application for *certiorari*) we consent may be used, if needful, to expedite the hearing, and we will conform to any **other order** which your Honors

may deem appropriate to remove any semblance of complaint by learned and distinguished counsel for Appellant **at any longer delay,** agreeing with them to this extent (p. 8):

> **"The same considerations of justice and expediency which induce the Court to expedite the decision of the ordinary criminal appeal should also lead to the granting of the present application."**

All of which is respectfully submitted.

F. J. McCORD,
Assistant Attorney General of Texas,

Thos. D. Frantlin

Shepard Barclay

Counsel for Appellee and for
The State of Texas

April, 1908

Supreme Court of the United States.

OCTOBER TERM, 1907.

No. 357.

HENRY CLAY PIERCE,
Appellant (Petitioner below).

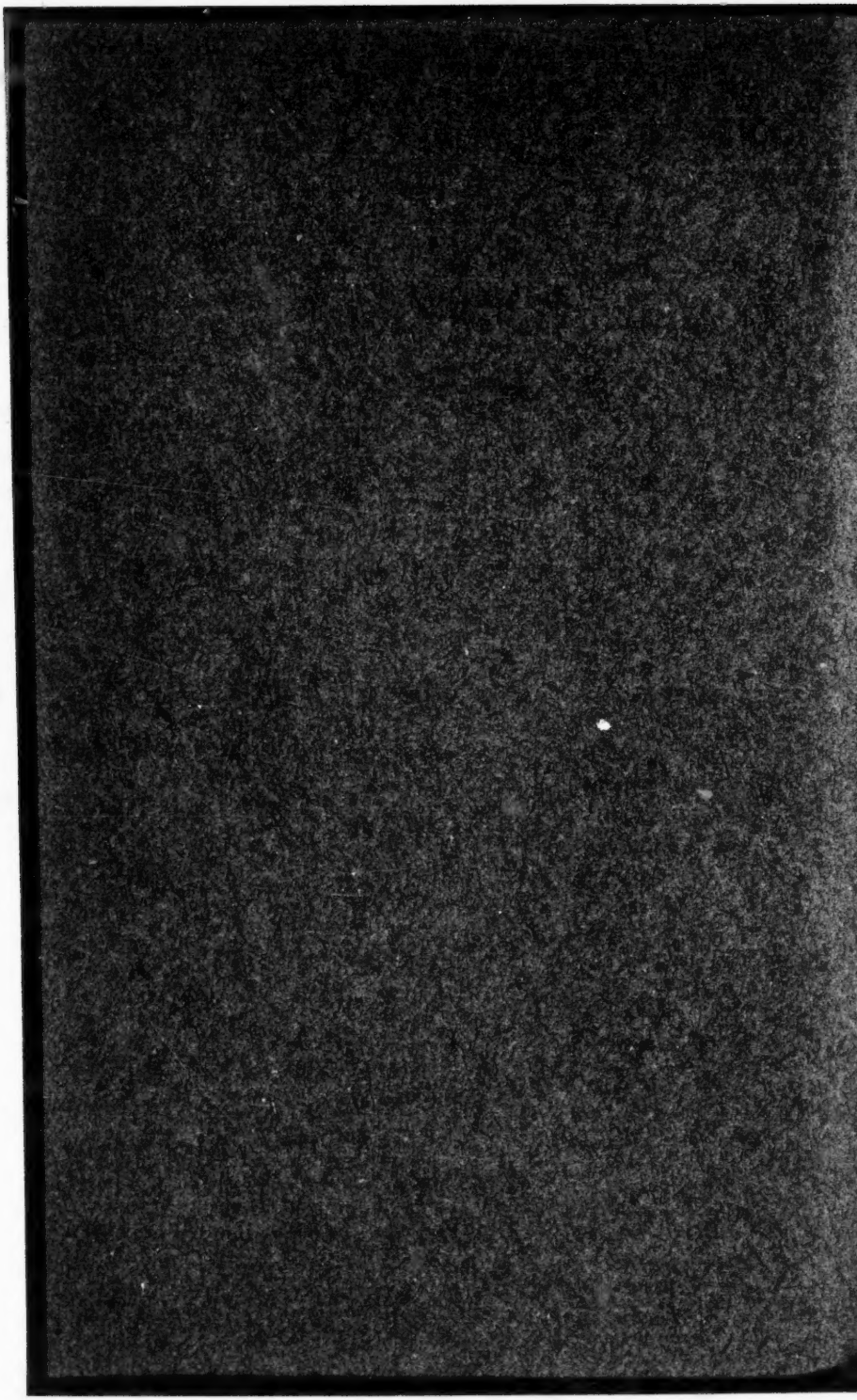
vs.

EDMUND F. CREECH, as Chief of Police of the City of St. Louis,
Appellee (Respondent below).

BRIEF ON BEHALF OF APPELLANT.

JOSEPH H. CHOATE,
HENRY S. PRIEST,
JOSEPH H. CHOATE, Jr.,
Counsel for Appellant.

Brooklyn Daily Eagle Printing Office, 26 Pierrepont St., New York.



IN THE

Supreme Court of the United States.

HENRY CLAY PIERCE,
Appellant,

v.

EDMUND P. CREECY, Chief of Police of the City of St. Louis,
Appellee.

BRIEF ON BEHALF OF APPELLANT.

Statement of Facts.

This is an appeal from a judgment of the Circuit Court of the United States discharging a writ of *habeas corpus* and remanding the appellant to the custody of the appellee.

The appellant was apprehended by the appellee under a warrant of the Governor of Missouri, predicated upon a requisition issued by the Governor of Texas (Record, pp. 2, 3, 10, 11). Accompanying the requisition was a document purporting to be a copy of an indictment returned by a Grand Jury of Travis County, Texas, charging appellant with an offense denominated under the statute of Texas "false swearing." This charge is predicated upon an affidavit made by Mr. Pierce on the 31st day of May, 1900, in behalf of the Waters-Pierce Oil Company, a corporation formed under and pursuant to the laws of the State of Missouri, on May 29, 1900 (pp. 3–6, 11–14). The form of the affidavit made was prescribed word for word by an act of the Legislature of the State of Texas, approved May 25, 1899, entitled "An Act

to prohibit pools, trusts, monopolies and combinations of charters of corporations that violate the terms of this act, and to authorize the institution and prosecution of suits therefor" (General Laws of Texas, 1899, p. 246).

The indictment, which contains a copy of the affidavit, is as follows:

> "IN THE NAME AND BY THE AUTHORITY OF THE STATE OF TEXAS.
>
> The Grand Jurors of Travis County, in said State, duly empaneled, sworn and charged as such at the September Term, A. D. 1906, of the District Court of said County, in and for the Fifty-third Judicial District, upon their oaths, in said Court, present:
>
> That Henry Clay Pierce, in said County and State, on or about the 31st day of May, in the year of our Lord nineteen hundred, and before the presentment of this indictment, did then and there present himself and make his personal appearance before N. H. Nagle, a duly and legally qualified and acting Notary Public within and for the County of Travis and State of Texas, who was then and there duly authorized by law as such officer and Notary Public to administer an oath; and the said Henry Clay Pierce, having been duly sworn by the said N. H. Nagle, acting in her capacity as such officer and Notary Public, did then and there unlawfully, deliberately, corruptly and wilfully, under the sanction of the oath so legally administered to him by the said N. H. Nagle, acting in the capacity aforesaid, make his voluntary false statement and declaration in writing, as follows:
>
> **Affidavit.**
>
> THE STATE OF TEXAS, }
> County of Travis. }
>
> I, HENRY CLAY PIERCE, do solemnly swear that I am the President, (President, Secretary, Treasurer or Director) of the Corporation known and styled Waters-Pierce Oil Company, duly incorporated under the laws of Missouri, on the 29th day of May, 1900, and now transacting or conducting

business in the State of Texas, and that I am duly authorized to represent said Corporation in making this affidavit, and I do further solemnly swear that the said Waters-Pierce Oil Company, known and styled as aforesaid, has not since the 31st day of January, 1900, created, entered into or become a member of or a party to, and was not, on the 31st day of January, 1900, nor at any day since that date, and is not now, a member of or a party to any pool, trust, agreement, combination, confederation or understanding with any other corporation, partnership, individual, or any other person or association of persons, to regulate or fix the price of any article of manufacture, mechanism, merchandise, commodity, convenience, repair, any product of mining, or any article or thing whatsoever, or the price or premium to be paid for insuring property against loss or damage by fire, lightning, storm, cyclone, tornado, or any other kind of policy issued by the parties aforesaid; and that it has not entered into or become a member of, or a party to, any pool, trust, agreement, contract, combination or confederation, to fix or limit the amount of supply or quantity of any article of manufacture, mechanism, merchandise, commodity, convenience, repair, or any product of mining, or any article or thing whatsoever, or the price or premium to be paid for insuring property against loss or damage by fire, lightning, storm, cyclone, tornado, or any other kind of policy issued, by the parties aforesaid; and that it has not issued, and does not own any trust certificates for any corporation, agent, officer or employe, or for the directors or stockholders of any corporation, has not entered into, and is not now in any combination, contract, or agreement with any person or persons, corporation or corporations, or with any stockholders or directors thereof, the purpose and effect of which said combination, contract or agreement would be to place the management or control of such combination or combinations, or the manufactured product thereof, in the hands of any trustee or trustees, with the intent to limit or fix the price, or lessen

the production and sale of any article of commerce, use or consumption, or to prevent, restrict, or diminish the manufacture or output of any such article; that it has not entered into any conspiracy, defined in the preceding sections of this act, to form or secure a trust or monopoly in restraint of trade; that it has not been since January 31, A. D. 1900, and is not now a monopoly by reason of any conduct on its part, which would constitute it a monopoly under the provisions of Sections 2, 3, 4, 5, 6, 10 and 11 of this Act, and is not the owner or lessee of a patent to any machinery intended, used or designed for manufacturing any raw material or preparing the same for market by any wrapping, baling or other process, and while leasing, renting or operating the same, refuses or fails to put the same on the market for sale; that it has not issued, and does not own any trust certificates, and has not, for any corporation or any agent, officer or employe thereof, or for the directors or stockholders thereof, entered into, and is not now in any combination, contract or agreement with any person or persons, corporation or corporations, or with the stockholders, director, or any officer, agent or employe of any corporation or corporations, the purpose and effect of which combination, contract or agreement would be a conspiracy to defraud, as defined in Section 1 of this Act, or to create a monopoly, as defined in Sections 2, 3, 4, 5, 6, 10 and 11 of this Act.

HENRY CLAY PIERCE,
President, Secretary, Treasurer or Director.

Subscribed and sworn to before me, a Notary Public within and for the County of Travis, this 31st day of May, 1900.

(Signed) N. H. NAGLE,
Notary Public.

WHEREAS, in truth and in fact the said Waters-Pierce Oil Company mentioned in the above false statement and declaration in writing, had since the 31st day of January, 1900, created, entered into, and become a

member of, and a party to, and was on the 31st day of January, 1900, and on every day since the 31st day of January, 1900, up to and on the 31st day of May, 1900, then and there a member of, and a party to, a pool, trust, agreement, combination, confederation, and undertaking with other corporations, individuals and other persons and association of persons, to wit: with the Standard Oil Company of New Jersey, a corporation incorporated under the laws of the State of New Jersey, and with all the Standard Oil Companies of the United States, the names and descriptions of said companies being to said Grand Jurors unknown after diligent inquiry, and with John D. Rockefeller, John D. Archbold, H. H. Rogers, and other individuals and persons whose names and a description of whom are to said Grand Jurors unknown after diligent inquiry, to regulate and fix the price of petroleum and all of the products of petroleum being articles of manufacture and a commodity and a convenience and a product of mining and an article and a thing; and, whereas, in truth and in fact the said Waters-Pierce Oil Company, hereinbefore mentioned, had since the 31st day of January, 1900, created, entered into and become a member of, and a party to, and was on the 31st day of January, 1900, and was on every day since the said 31st day of January, 1900, up to and on the 31st day of May, 1900, then and there a member of and a party to a pool, trust, agreement, combination, confederation and undertaking with other corporations, individuals, and other persons and association of persons, to wit: The Standard Oil Company of New Jersey, a corporation, incorporated under the laws of the State of New Jersey and with all the Standard Oil Companies of the United States, the names and descriptions of said Companies being to said Grand Jurors unknown after diligent inquiry, and with John D. Rockefeller, John D. Archbold, H. H. Rogers and other individuals and persons whose name and a description of whom are to said Grand Jury unknown after diligent inquiry, to fix and limit the amount of supply and quan-

tity of petroleum and all of the products of petroleum, the said petroleum and all the products of petroleum being articles of manufacture and a commodity and a convenience and a product of mining and an article and a thing; and, whereas, in truth and in fact the said Waters-Pierce Oil Company, hereinbefore mentioned, had since the 31st day of January, 1900, and on every day since said 31st day of January, 1900, up to the 31st day of May, 1900, issued, and did then and on the 31st day of May, 1900, issued trust certificates to another corporation, to wit, the Standard Oil Company of New Jersey, hereinbefore described, its agent, officer and employe, to wit, one J. P. Gruet, and one John D. Johnson, and other agents, officers and employes of said Standard Oil Company of New Jersey whose names and descriptions are to said Grand Jurors unknown after diligent inquiry, whereby the said Standard Oil Company of New Jersey then and there became the owner of the majority of all the shares of stock of the said Waters-Pierce Oil Company and the owner of a controlling interest in said Waters-Pierce Oil Company, which said false statement, so made as aforesaid, by the said Henry Clay Pierce, was not then and there required by law nor made in the course of judicial proceedings. Yet the same was then and there, nevertheless (willful) and deliberately made and was wilfully and deliberately false, as he, the said Henry Clay Pierce, then and there well knew * * *

Against the peace and dignity of the State.

JEFFERSON JOHNSON,
Foreman of the Grand Jury.

Endorsed: No. 15,357. The State of Texas *vs.* Henry Clay Pierce. Indictment. Offense: False Swearing. Filed in the District Court, of Travis County, for the 53rd Judicial District, this 1 day of Novr., A. D. 1906, Jas. P. Hart, Clerk District Court, Travis Co., Texas. By E. Huppertz, Deputy. Witnesses for the State: Miss N. H. Nagle, D. H. Hardy, Jefferson Co., Tex., J. P. Gruet."

The assignments of falsity are in substance as follows:

(*a.*) That the Waters-Pierce Oil Company (*organized on May 29, 1900*) had, since the 31st day of January, 1900, and on every day since then, up to and including May 31, 1900, created, entered into and become a party to a pool, trust, agreement, combination, confederation and understanding with other corporations, individuals and other persons and associations of persons, to wit, the Standard Oil Company of New Jersey, a corporation of New Jersey, and with all the other Standard Oil Companies of the United States, the names and descriptions being unknown to the Grand Jury, and with John D. Rockefeller, John D. Archbold, H. H. Rogers and other individuals and persons unknown, to regulate and fix the price of petroleum and all the products of petroleum;

(*b.*) and that the said Waters Pierce Oil Company, since the 31st day of January, 1900, and every day since then, and up to and on the 31st day of May, 1900, had created, entered into and become a member of and a party to a pool, trust, agreement, combination, confederation and undertaking with other corporations, individuals and other persons and association of persons, to wit, the Standard Oil Company, a corporation of New Jersey, and with all the Standard Oil Companies of the United States (the descriptions being unknown to the Grand Jurors), and with John D. Rockefeller, John D. Archbold, H. H. Rogers and other individuals and persons whose names are unknown, to fix and limit the amount of supply and quantity of petroleum and all the products of petroleum;

(*c.*) That the said Waters-Pierce Oil Company since the 31st day of January, 1900, and on overy day thereafter, up to the 31st day of May, 1900, issued trust certificates to another corporation,

to wit, the Standard Oil Company of New Jersey, its agent, officer and employee, to wit, J. P. Gruet and John D. Johnson, and other agents, officers and employees of the said Standard Oil Company, whereby said Standard Oil Company became the owner of the majority of all the shares of stock of the Waters-Pierce Oil Company and the owner of a controlling interest in said Waters-Pierce Oil Company.

When apprehended by the appellee, under the Governor's warrant, Mr. Pierce filed a petition for a writ of *habeas corpus*, in the Circuit Court of the United States for the Eastern Division of the Eastern District of Missouri, setting forth a copy of the warrant under which he was arrested, together with a copy of the requisition papers, which included a copy of the indictment, and averring that he was restrained of his liberty, in violation of the laws and Constitution of the United States. The petition charged that the restraint of the petitioner under the warrant was illegal and in violation of the Constitution and statutes, because the indictment was insufficient by reason of the following defects:

> "FIRST.—It is not shown by any sufficient averments in the said indictment that the facts stated or opinions expressed by petitioner in the affidavit set forth in said indictment were false when the said affidavit was made, and hence the said indictment charges no offense under the laws of the State of Texas. That so far as the averments of the said indictment are concerned, the conclusion, judgment and opinion of petitioner expressed in the affidavit are only alleged to be false in the conclusion, judgment and opinion of the Grand Jury preferring said indictment.
>
> SECOND.—That the affidavit made by your petitioner was in the form prescribed by an Act of the Legislature of the State of Texas, entitled "An Act to prohibit pools, trusts, monopolies and conspiracies to control busi-

ness and prices of articles; to prevent the formation or operation of pools, trusts, monopolies and combinations of charters of corporations that violate the terms of this Act, and to authorize the institution and prosecution of suits therefor," which was approved May 25th, 1899, and became effective January 31st, 1900 (Gen. Laws Texas, 1899, p. 246), and that the language of said affidavit must be construed and interpreted in connection with the related text of the Act of which it forms a part; that the pools, trusts, combinations, conspiracies and monopolies prohibited by said Act were such only as were formed by such natural or artificial legal entities as were then engaged in business in the State of Texas, and the indictment does not show or charge that the Waters-Pierce Oil Company, organized on May 29th, 1900, as stated by petitioner in said affidavit, contrary to the fact stated by your petitioner in said affidavit, was a member of, or party to, any pool, trust, agreement, combination, confederation or understanding with any other corporation, partnership, individual, or any person, or association of persons, then or theretofore transacting or doing business in the State of Texas, for the purpose of fixing the price or limiting the output or quantity of any article or thing whatsoever to be sold or marketed in said State of Texas.

THIRD.--That no charge of perjury or false swearing could legally be predicated upon any matter or thing stated in said affidavit, for the reason that the statements therein contained are mere expressions of legal conclusions or opinions upon a state of facts existent in the belief of the affiant.

FOURTH.—The affidavit being required by law, if false, could not be false swearing under the Laws of the State of Texas.

FIFTH.—For that it appears upon the face of the said indictment that more than four years elapsed between the date of the commission of the alleged offense and the finding of the said indictment (pp. 6, 7).

The appellee producing the petitioner, made the return that he held him by virtue of the warrant of the Governor of Missouri (p. 10). To this return the appellants filed an answer admitting in so far as it went, the truth of the return, reciting the indictment which accompanied the requisition papers, and charging its invalidity substantially as set forth in the original petition (pp. 10–15). Certified copies of the indictment and of the requisition papers were offered in evidence. After a hearing upon these papers, the petitioner was remanded to the custody of the appellee (p. 16). He thereupon petitioned for and was granted the present appeal to this Court (pp. 19, 16).

The assignments of error are as follows:

1. The Court erred in holding that the indictment, which was the only evidence of the existence of a charge of crime, contained any fundamental evidence of the crime of false swearing or perjury.

2. That the Court erred in not holding that the language and terms of the affidavit upon which the pretended charge of false swearing was based was to be interpreted by the act of the Legislature of the State of Texas of 1899, entitled "An Act to Prohibit Pools, Trusts, Monopolies and Conspiracies to Control Business and Prices of Articles; to prevent the formation or operation of pools, trusts, monopolies and combination of charters of corporations that violate the terms of this Act and to authorize the institution and prosecution of suits therefor," approved May 25, 1899 (Gen. Laws of Texas, 1899, p. 246), of which form of the affidavit made by petitioner was a part and that as thus interpreted no offense is stated in and by said indictment.

3. The Court erred in holding that an offense is charged in said pretended indictment.

4. The Court erred in holding that the pretended offense was not discharged by the Statute of Limitations of the State of Texas.

5. The Court erred in not holding that petitioner was held in violation of the Constitution and Laws of the United States and without being advised of the cause and nature of the accusation made against him.

6. The Court erred in holding that false swearing or perjury could be judicially predicated upon anything stated in affidavit whereof petitioner is charged with false swearing, for that all of said matters so set forth in said affidavit and assigned as false swearing in and by said indictment are merely matters of opinion upon which a charge of false swearing could not be affirmed.

7. The Court erred in holding that the pretended indictment contained under the laws of Texas any essential or fundamental charge of crime.

8. Because upon the whole record the petitioner should have been discharged (Record, p. 18).

ARGUMENT.

I.

This Court has jurisdiction of the present appeal.

We do not apprehend that there can be any serious doubt as to this proposition. At the same time, in view of the rule laid down by this Court in *Defiance Company* v. *Defiance*, 191 U. S., 184, that the fundamental question of jurisdiction, whether propounded by counsel or not, presents itself at the outset of every appeal, we feel obliged to state the reasons for our belief.

It is perfectly well settled that where a petition to a Circuit Court of the United States for a writ of

habeas corpus raises a question of the construction or application of the Constitution of the United States, the case falls within the fifth section of the Act of March 3, 1899, and an appeal may be taken directly from the judgment of the Circuit Court to this Court.

Boske v. *Comingore*, 177 U. S., 459.
Craemer v. *Washington*, 168 U. S., 124.
In re Marmo, 138 Fed., 201.

In the case at bar the petition for the writ distinctly alleged, as the basis of the petitioner's right, that the detention of the appellant was in violation of the Constitution of the United States, in that the indictment upon which the extradition proceedings were based did not constitute a "charge of crime" within the meaning of Article 4, Section 2, Subdivision 2 of the Constitution (Record, pp. 2-6-7), and therefore did not justify the arrest. There can be no doubt that this contention raised a question of the construction and application of the Constitution.

Roberts v. *Reilly*, 116 U. S., 80.
Matter of Strauss, 197 U. S., 324.

That this constitutional question was the substantial question litigated in the Circuit Court further appears unmistakably from the opinion of Adams, *J.*, below (Record, pp. 20-24), to which the Court may and should turn for information on this subject.

Loeb v. *Columbia Township*, 179, U. S., 472.

From the authorities above cited it is apparent that the appeal to this Court was properly taken. The fact that a separate appeal was subsequently taken to the Circuit Court of Appeals for the Eighth Circuit (which does not appear upon this record, but which this Court may recall from our application for a writ of *certiorari* to bring the case from that

Court into this) could not, of course, affect the jurisdiction of this Court, which had already attached:

Columbus Co. v. *Crane Co.*, 174 U. S., 600.

Nor could the subsequent appeal constitute a waiver of this appeal.

Pullman Co. v. *Central Co.*, 171 U. S., 138.

II.

The validity of the warrant on which the appellant was arrested depends upon the substantial sufficiency of the indictment on which it was based. Unless that indictment, when tested as on motion in arrest of judgment, is capable of supporting a conviction, the requirements of the Constitution are not fulfilled and the extradition is unauthorized.

The right of interstate extradition does not exist by comity. It rests upon the Constitution of the United States (Art. 4, Sec. 2, Subd. 2), which created it, and upon the legislation of Congress (U. S. R. S., Sec. 5278, Act of Feb. 12th, 1793, ch. 7, 1 Stat. L. 302) enacted in pursuance of the Constitutional provision, which regulates the manner in which it shall be exercised (*Ex parte Morgan*, 20 Fed., 298; *In re Kopel*, 145 Fed., 505). No man can be lawfully arrested for extradition and handed over to the agent of a State other than that of the arrest, except under the circumstances and in the manner permitted by these provisions. Whenever a State or any of its officers attempts to exercise the power to extradite, the proceedings must conform to the requirements of the

Constitution and of the Act of Congress or they will be unauthorized and void.

The power is obviously one which readily lends itself to abuse, and the facts that it had been and might be oppressively and tyrannically exercised was clearly in the minds of the framers of the constitutional and legislative provisions on the subject. Hence the Constitution carefully limits the power by prescribing that certain jurisdictional facts must exist as conditions precedent to its exercise, while the statute provides the manner in which the existence of such facts is to be proved. The Constitution authorizes the extradition of a citizen only when he is shown to be, first, a person "charged with crime," in the demanding state, and, second, a "fugitive from justice." The statute authorizes the governor of the asylum state to act only when the fact that the demanded person is "charged with crime" in the demanding state is shown on the face of the requisition "by a copy of an indictment found, or an "affidavit made before a committing magistrate "* * * charging the person demanded with "having committed treason, felony or other crime." Unless the demanded person be thus proven to be a person "charged with crime" in the demanding state, the facts do not appear which give the governor of the ayslum state jurisdiction to issue the warrant. If the warrant be issued without such proof, the act of the governor in issuing it can derive no authority from the constitution or statute and is unauthorized and void.

In the case at bar there was annexed to the requisition a copy of a paper described as an indictment, which purported to allege that over six years before its date the appellant swore to a certain affidavit and that this affidavit was in some respects untrue. Except for this copy nothing was presented to the governor of the asylum state which had any tendency to show that the appellant was a person "charged with crime." If the

alleged indictment was in itself a "charge of crime," within the meaning of the Constitution and statute, and if it was an "indictment" within the meaning of § 5278 R. S., the first essential jurisdictional fact was properly proven, and the warrant may have been lawful; if not, then one of the conditions precedent was unfulfilled and no power existed under which the warrant could lawfully be issued. The indictment, then, was and still is the sole evidence in the case that the appellant is a person "charged with crime." It is as such evidence only that we have to deal with it. We do not attack it as a criminal pleading at all, but as all and the only evidence from which the Court can infer that the demanding State has preferred a charge of crime against the appellant. This piece of evidence must be tested by all the rules of interpretation and construction which courts ordinarily employ against such formal and *ex parte* instruments, and in the light of those provisions of the Constitution which are intended to protect the lives and liberty of citizens. Unless, when so tested, it appears, within the meaning of the Constitutional provision, to charge the appellant with crime, and to be such an indictment as is required by Section 5278, R. S., as proof of the charge of crime, it fails to prove the fundamental jurisdictional fact, and affords no justification for the issuance of the warrant.

The primary question, then, is, what is meant in the Constitution by the words "charged with crime?" Clearly, they do not mean merely that irresponsible slanders have been uttered by unofficial persons against the person demanded, nor yet that officially a grand jury has "found" as an indictment a paper which contains no accusation. The consensus of the authorities on the subject has been well stated by Cooley, *J.* (Princeton Review, January, 1879, p. 165), as follows:

> "This means that he shall be charged in due form of law in some proper judicial pro-

> ceeding instituted in the state from which he is a fugitive. This charge is to be the foundation for the demand and for the warrant of surrender; and it cannot be sufficient unless it contains all the legal requisites for the arrest of the accused and his detention for trial if he were within the State."

So also by Spear in his work on Extradition, where (2nd Ed., p. 376), summing up the results of his very careful analysis of the cases, he says:

> "The charge whether in the form of an indictment or that of an affidavit must set forth the essential facts and circumstances of the act or acts alleged as constituting the crime charged. Every crime is a particular crime, and legally to charge its commission is to state the act or acts in the circumstances of time and place by which it was committed. This must be done with sufficient explicitness and fullness to show that, upon the assumption of the truth of the charge, a crime has been actually committed."

These conclusions are well supported by the actual decisions. Prisoners arrested for extradition, though held on warrants issued in response to requisitions containing duly authenticated affidavits alleging that the person demanded had committed a crime, have repeatedly been discharged on *habeas corpus* on the ground that the affidavits did not constitute charges of crime within the Constitution. Thus in *Ex parte Smith*, 3 MacLean, 121, a case, the importance of which is obvious, an application for the writ of *habeas corpus* was presented to the United States District Court by Joseph Smith, the Mormon prophet, who was held under a warrant issued in response to a requisition based on a duly authenticated affidavit alleging that he was an accessory to a certain murder. The affidavit explicitly stated that a murder had been committed and that Smith was accessory thereto, but did not

state the particular acts committed by Smith in connection with the crime. The Court (Pope, *D. J.*), after hearing elaborate argument, discharged the prisoner, holding that the affidavit, though in formal compliance with Sec. 5278, R. S., was not a "charge of crime." So in the leading case of *People ex rel. Lawrence* v. *Brady*, 56 N. Y., 182, where the New York Court of Appeals reversed a judgment which had discharged the writ of *habeas corpus* and remanded the prisoner. There the affidavit, on which the warrant and requisition were based, charged that the relator confederated with others to defraud certain persons of property by false pretenses, but did not distinctly state what the pretenses were nor wherein they were false. The Court held that as an indictment similar to the affidavit would have been bad in New York and would not, so far as was shown by the affidavit, have been good in the demanding state, no "charge of crime" was shown, and the prisoner must be released. Andrews, *J.*, in delivering the opinion, said:

> "It would be a dangerous precedent if it should be held that a man could be deprived of his liberty and removed to another state, upon an accusation so vague and unsatisfactory as is contained in the affidavits in this case. It is a reasonable rule, supported by obvious considerations of justice and policy, that when a surrender is sought upon proof, by affidavit, of a crime, the offense should be distinctly and plainly charged. Security to personal liberty demands this, and the State will meet the full measure of its obligation, under the Federal Constitution, if it requires this before consenting to the arrest and removal of alleged offenders."

It seems to be well settled that the rule is the same whether the requisition and warrant are based on an affidavit or on an indictment. In *Roberts* vs. *Reilly*, 116 U. S., 80, this Court, in considering

the validity of a warrant based on an indictment, examined the sufficiency of the indictment precisely as the courts in the cases last cited examined the sufficiency of the affidavits, and said:

> "It must appear, therefore, to the Governor of the State to whom such a demand is presented, before he can lawfully comply with it, first, that the person demanded is substantially charged with a crime against the laws of the State from whose justice he is alleged to have fled, by an indictment or an affidavit, certified as authentic by the Governor of the State making the demand; and, second, that the person demanded is a fugitive from the justice of the State the executive authority of which makes the demand.
>
> *The first of these prerequisites is a question of law and is always open upon the face of the papers to judicial inquiry on an application for a discharge under a writ of habeas corpus.*"

See also

Work v. *Covington*, 34 Ohio St. R., 73.
Barriere v. *State*, 39 So. Rep. (Ala.), 55.

This conclusion is well sustained in principle. When considered as proof of the existence of a charge of crime the sufficiency of an indictment, like that of an affidavit, must obviously depend not on formal matters, but upon the legal effect of the facts alleged. If either an indictment or an affidavit alleges facts as distinguished from conclusions from which the judicial mind can see that the accused has committed some act which is in violation of the penal law of the demanding State, the document constitutes a "charge of crime" within the Constitution as interpreted by the cases cited: otherwise, the accusation which it states is at most only the conclusion of the pleader or the opinion of the affiant. The truth of the allegations in each is equally immaterial. If there be any distinction, an indictment rather than an affidavit should be the more severely scru

tinized. While an affidavit may be the informal statement of a layman, an indictment must be presumed to be the work of a skilled pleader, fully conversant with all the evidence against the accused.

Moreover, there is another line of decisions of high authority which establishes beyond dispute that the mere existence of an indictment is not conclusive proof of the necessary jurisdictional fact. These are the strictly analogous cases where on *habeas corpus* the release is sought of prisoners held for removal from one judicial district of the United States to another. In these cases, it is true, the jurisdictional fact is not literally the same as that required for extradition. The statute (R. S., Sec. 1014) authorizes the removal not of any person "charged with crime" but of any "offender." We are now dealing, however, not with the nature of the jurisdictional fact, but with the effect of an indictment offered as proof thereof; and in these cases it is well settled that the jurisdictional fact is proven only by an indictment which will support a conviction. In *Stewart* v. *U. S.*, 119 Fed., 89, the Circuit Court of the United States had discharged a writ of *habeas corpus*, and had remanded the prisoner. On appeal, the Circuit Court of Appeals for the Eighth Circuit reversed the judgment, on the ground that the indictment on which the warrant of removal was issued was insufficient. In the opinion it is said (per Thayer *J.*, at p. 93),

> "The consensus of judicial opinion seems to be that when a United States Commissioner, proceeding under Section 1014 of the Revised Statutes of the United States (U. S. Comp. St., 1901, p. 716), commits a prisoner for removal to a foreign district where the prisoner has been indicted the prisoner may apply to the federal circuit or district court of the district where he has been arrested for a writ of *habeas corpus*, and if, on the return to such writ, it appears that he was committed for removal solely on the strength of an indictment found in the foreign district, and without other evidence that a

> crime has been committed, he may be discharged, provided, it appears that the indictment, on the strength of which the commitment was obtained, is essentially and fundamentally defective."

So in *In re Terrell*, 51 Fed., 213, an indictment was held insufficient to justify the warrant of removal, and in discharging the prisoner the Court said (per Lacombe, *J.*)

> "There is good cause for holding that this power should be exercised liberally, whenever the judge before whom the questions are raised, on application for a warrant of removal, or on *habeas corpus*, is satisfied, from the face of the indictment, that were such indictment before him for trial, and demurred to, he would quash it. This is a country of vast extent, and it would be a grave abuse of the rights of the citizens if, when charged with alleged offenses committed perhaps in some place he had never visited, he were removable to a district thousands of miles from his home, to answer an indictment fatally defective on any mere theory of a comity which would require the sufficiency of the indictment to be tested only in the particular court in which it is pending. Nor should the mere novelty of the points raised be held to preclude the Court, before which comes the question of removal, from passing upon them, when it has no doubt as to how it would pass upon them if the cause were pending before it."

So also

> *In re Buell*, 3 Dill., 116.
> *In re James*, 18 Fed., 853.
> *U. S.* v. *Brawner*, 7 Fed., 86.
> *In re Dana*, 68 Fed., 886.

That these decisions are unquestionably sound also appears from the opinion of this Court by Mr. Justice Peckham in *Greene* v. *Henkel*, 183 U. S., 249, where, at page 261, it is said:

> "We do not, however, hold that when an indictment charges no offense against the

> " laws of the United States, and the evidence
> " given fails to show any, or if it appear that
> " the offense charged was not committed or
> " triable in the district to which the removal
> " is sought, the Court would be justified in
> " ordering the removal, and thus subjecting
> " the defendant to the necessity of making
> " such a defense in the court where the in-
> " dictment was found. In that case there
> " would be no jurisdiction to commit nor any
> " to order the removal of the prisoner."

Indeed, in the case of *Tinsley* v. *Treat*, 205 U. S., 20, this Court has carried the doctrine even further, holding that the indictment might be attacked not only for defects appearing on its face, but even, under some circumstances, by proof *aliunde*.

In spite of the apparent difference in the jurisdictional fact to be proven by the indictment in the two classes of cases these decisions are applicable, *a fortiori*, to cases of extradition. In the first place, the fact to be proved by the indictment, when it alone, without other evidence, is offered to justify the warrant, is essentially the same in removal cases as in extradition. In neither class of cases can the truth of the avermerts be entered into, but in each the question is as to the legal effect of the facts alleged. If the indictment alleges all the essential elements of a crime, it is a " charge of crime." The truth of these same allegations being admitted they serve to establish at the same time that the prisoner is an " offender." The sole difference between an " offender " and a person " charged with crime " is obviously that an " offender " must not only be accused but must also in some sense be proven guilty. Where the indictment stands alone, however, it furnishes simultaneously both accusation and proof, so that if it fails to prove the jurisdictional fact necessary for removal, it must also fail to prove the condition precedent to extradition. In the second place, the mere removal of a prisoner from one federal district to another, transferring him simply

from one branch of the court to another, both of which branches apply the same law, is a far less serious matter and one which has far less tendency to endanger the rights of the prisoner than extradition. As was said by Mr. Justice Brewer, in drawing the same distinction in Beavers *v.* Henkel, 194 U. S., 73 (a removal case):

> "At the outset it is well to note that this is not a case of extradition. There was no proposed surrender of petitioner by the United States to the jurisdiction of a foreign nation, no abandonment of the duty of protection which the nation owes to all within its territory. There was not even the qualified extradition which arises when one state within the Union surrenders to another an alleged fugitive from its justice. There was simply an effort on the part of the United States to subject a citizen found within its territory to trial before one of its own courts. The locality in which an offense is charged to have been committed determines under the Constitution and laws the place and court of trial. And the question is what steps are necessary to bring the alleged offender to that place and before that court."
>
> "Obviously very different considerations are applicable to the two cases. In an extradition the nation surrendering relies for future protection of the alleged offender upon the good faith of the nation to which the surrender is made, while here the full protecting power of the United States is continued after the removal from the place of arrest to the place of trial."

These cases are, therefore, direct and cogent authorities upon the point at issue in the case at bar, and coupled with the other decisions cited establish conclusively that in order to sustain a requisition and warrant of extradition an indictment must substantially allege facts which, if proven, would convict the prisoner of crime. The test, by which the sufficiency of an indictment is to be measured, appear to be that applied by the Court in the case of

Stewart v. *U. S.*, *supra;* that if after conviction upon it the Court would be obliged to sustain a motion in arrest of judgment it cannot be held sufficient as a basis for extradition.

This test to be applied under the law of the demanding State, which, of course, determines whether or not the facts alleged constitute a crime. In the case at bar, the indictment is or is not a "charge of crime" within the Constitution, according as it states or fails to state facts which, by the law of Texas, constitute the commission of a crime. The criminal law of Texas is thus, as it were, incorporated by reference into the Constitution, just as the election laws of the several States are incorporated into those provisions of the Constitution which regulate the election of congressmen (*Wiley* v. *Sinkler*, 179 U. S., 58). Unless, then, the indictment, in substance, complies with the requirements of the Texas law, the issuance of the warrant and the arrest thereon were in violation of the Constitution. In order to decide the constitutional question, the Circuit Court, on the hearing below, was necessarily obliged to apply the Texas law, exactly as if it had been a Texas court. This, as a Federal court, it could, of course, do without requiring proof as to what the Texas law was, and this fact serves to distinguish a number of decisions, relied upon by the appellee, in which divers very questionable indictments were held sufficient to support warrants of extradition. These were cases in various *State* courts, which could not take judicial notice of the law of the demanding State, but could apply it only as it was proved before them as a fact. The sole point necessarily decided in these cases, therefore, was merely that the proof did not enable the Court to say that the indictment before it was bad in the demanding State. Of this character is the case of *Pearce* v. *Texas*, 32 Tex. Crim. App., 301; affirmed, 155 U. S., 311. We have not discovered, however, any decision in which any court has definitely re-

fused to consider the validity of the indictment under the law of the demanding State. On the other hand, in a well-considered and comparatively recent Federal case the sufficiency of the indictment was considered exactly as if it had arisen on demurrer before a court of the demanding State.

Webb v. *York*, 79 Fed., 616.

The situation in the present case must not be confused with that which arises where by means of the writ of *habeas corpus* it is sought to release a prisoner who is held by the authorities of the State in which the indictment is found. In such cases the Court properly refuses to permit the writ of *habeas corpus* to be used to test the validity of the indictment, either after conviction, or in advance of any proceedings in the courts of the indicting State. The power of the Federal court to issue the writ where the petitioner alleges that he is held under an insufficient indictment, is not denied, but it is held that in such cases the issue of the writ is discretionary, and that it should only be granted in cases of urgency (*New York* v. *Eno*, 155 U. S., 89). This rule, however, has no application even where the prisoner is held in the indicting State, where it is shown that the arrest and detention are without jurisdiction.

Ex Parte Bain, 121 U. S., 1.
In re Ayers, 123 U. S., 443.
In re Sawyer, 124 U. S., 200.
In re Coy, 127 U. S., 731.
In re Nielsen, 131 U. S., 176.
Ohio v. *Thomas*, 173 U. S., 276.
Ex Parte Siebold, 100 U. S., 371.
In re Snow, 120 U. S., 274.

These authorities amply suffice to establish that the courts of the United States should interfere by *habeas corpus* to release even persons held by State officers if the detention is without jurisdiction and is in violation of any Federal right. In extradition,

however, the Governor has authority to act, not as a State officer under State law, but solely by virtue of the Constitution and statutes of the United States. In issuing the warrant he acts, if his act has any validity, as a Federal official in execution of Federal law. An arrest upon a warrant issued by him without jurisdiction, therefore, necessarily violates a Federal right, and entitles its victim to relief from the Federal court by writ of *habeas corpus*.

From all these considerations it follows that if the indictment in the case at bar was defective under the Texas law, not as matter of technical criminal pleading, but in substance, so that a conviction thereon could not be sustained, or if, irrespective of the Texas law, it was not such an indictment charging a crime as is required by the Constitution and by § 5278, R. S., the warrant was unlawfully issued, and the judgment below was erroneous.

For the following reasons, therefore, we submit that:

III.

The indictment was fatally defective.

Preliminary to a discussion of the substantial defects of the indictment, we desire to make some observations concerning the essential facts which constitute the crime of false swearing and the averments necessary in a charge of this crime. The gist of the crime consists in consciously false statement of fact; in the deliberate assertion that one state of facts exists when in truth another and wholly inconsistent state of facts exists. The facts which constituted the crime, therefore, cannot be charged without alleging, first, the statement made by the accused person, and, second, the facts which in truth existed and which were inconsistent with the statements so made by the accused.

An indictment alleging merely that the accused made the statement and that it was false is insufficient, not because of any mere rule of pleading, but because of the omission to allege the facts inconsistent with the statements, which facts are part, not merely of the proper statement of the crime, but of the crime itself. In the absence of these facts the allegations that the statement was false is a mere conclusion of the pleader. The facts which constitute the truth must, therefore, be distinctly alleged not because they are a requirement of the indictment as a pleading, but because without them the crime of false swearing can be show only by conclusions.

The assignments of perjury or false swearing, moreover, must not only allege distinctly, and not by way of conclusion, what the true facts were, but must serve to demonstrate the falsity of the facts sworn to. If all that the assignments set out may be true and still be entirely consistent with the truth of the matter alleged to be false, there can be no substantial charge of false swearing, since nothing in the facts alleged would serve to impeach or destroy the truth of the facts sworn to by the accused. If the facts alleged to be true by the assignments of false swearing, and the facts sworn to by the accused are not inconsistent, the indictment is equivalent to a charge that the accused perjured himself in swearing to statements which were true. The statements alleged to be false and the statements alleged by the assignment to be true must in tenor and meaning be inconsistent so that both cannot by the same tokens of interpretation or inference be true.

Thus, Rolfe, *B.*, in Reg *vs.* Whitehouse, 3 Cox, C. C., 86, said:

> "The indictment cannot be read as averring that the defendant swore that he did not play at any time during that evening, but merely that he did not play at a particular period of the evening, namely from some

period before seven until nine. That might be perfectly true and yet he may have played between six and seven and so may have played as is assigned in the indictment, between six and eight. The defendant is discharged."

Bishop (Bishop's New Crim. Procedure), Vol. II., Sec. 918, says:

> "Assignment of perjury is the name commonly given to this part of the indictment. After stating the substance of what was sworn to, as just explained, it proceeds: 'whereas, in truth and in fact', adding wherein such matters were false. This is of the gist of the offense, not mere inducement; consequently the allegation must be direct and specific, not in terms of uncertain meaning, or by way of implication. Simply to say, for example, that the defendant falsely swore, is not adequate. Or if the indictment sets out two contradictory oaths, taken at different times, an assignment is not good which does not say which was the false one."
>
> SEC. 919. "This averment will vary with the matter to be negatived. *It must be certain; so that if all it sets out may be true, yet no perjury have been committed, it will be inadequate.* It must particularize wherein the testimony was false, a general allegation that it was so not being commonly sufficient. While in some connections a short negative will satisfy this requirement, in others much amplification will be necessary."

The fact that the crime of perjury or false swearing cannot legally be charged without assignments of falsity sufficient within the above reasoning, is perfectly established in Texas.

Gabrielsky v. *State*, 13 Tex. App., 428.

Higgins v. *State*, 38 Tex. Crim. Ap., 539; 43 S. W., 1012; 1898.

McMurtry v. *State*, 38 Tex. Crim. Ap., 521; 43 S. W., 1010; Tex., 1885.

Morris v. *State*, 83 S. W., 1126.

Turner v. *State*, 30 Tex. Crim. App., 691.

Another absolute essential of the crime of false swearing is that the alleged false statement sworn to by the accused, shall be a statement of fact and not of the conclusion or opinion of the witness. This is of course elementary, but it is so important here that we venture to append by way of illustration a few authorities. Thus, it has been held that there was no perjury:

1. Where defendant swore that certain property belonged to him and there was a question of title under a bill of sale (*Anonymous* Fed. Cases, No. 475).

2. Where defendant, acting as agent or go-between, got liquor for children, and then swore that he had not sold it to them in violation of the statute against selling drink to minors, this although his act was plainly a sale within the statute (*Harp* v. *State*, 59 Ark., 113).

3. Where defendant swore that he had not unlawfully sold liquor to a witness (*State* v. *Henderson*, 90 Ind., 406).

4. Where defendant swore that certain wood was worth twenty-five cents a load and it was not (*State* v. *Fannon*, 158 Mo., 149).

5. Where defendant gave under oath an absurd estimate of value (*In re Howell*, 114 Cal., 250).

So also

State v. *Woolverton*, 8 Blackf., 453.
Rex v. *Crespigny*, 1 Esp., 280.
State v. *Marshall*, 47 Mo., 378.
State v. *Lloyd*, 77 Wis., 630.

Bearing these considerations in mind, we may now point out in detail the defects by reason of which the indictment of the case at bar fails substantially to charge the crime of false swearing.

(A.)

The statements alleged in the indictment to have been falsely sworn to by the appellant, are not statements of fact, but are expressions of mere opinions, beliefs and conclusions, upon which the crime of false swearing cannot be predicated.

The portions of the appellant's affidavit which are contradicted are those in which he states:

> (1.) "That the said Waters-Pierce Oil Company * * * has not since the 31st day of January, 1900, created, entered into or become a party to * * * and is not now a member of or the party to any pool, trust agreement, combination, confederation or understanding with any other corporation, partnership, individual, or any other person or association of persons to regulate or fix the price of any article of manufacture, etc."
>
> (2.) "That it has not entered into or bebecome a member of or a party to any pool, trust agreement, contract, combination or confederation to fix or limit the amount or supply or quantity of any article of manufacture, etc."
>
> (3.) "That it has not issued and does not own any trust certificates for any corporation, agent, officer or employee, or for the directors or stockholders of any corporation, has not entered into and is not now in any combination, contract or agreement with any person or persons, corporation or corporations, or with any stockholders or directors thereof, the purpose and effect of which said combination, contract or agreement would be to place the management or control of such combination or combinations, or the manufactured product thereof in the hands of any trustee or trustees with the intent to limit or fix the price or lessen the production and sale of any article of commerce, use or consumption, or to prevent, restrict or diminish the manufacture or output of any such article * * * that it has not issued and does not own any trust certificates and has not for

any corporation or any agent, officer or employee thereof, or for the directors or stockholders thereof entered into and is not now in any combination, contract or agreement with any person or persons, corporation or corporations, or with the stockholders, directors, or any officer, agent or employee of any corporation or corporations, the purpose and effect of which combination, contract or agreement would be a conspiracy to defraud, as defined in Section 1 of this Act, or to create a monopoly, as defined in Sections 2, 3, 4, 5, 6, 10 and 11 of this Act."

The affidavit of which these statements form a part is in form prescribed by the Anti-Trust Law of Texas (Gen. Laws of Texas, 26 Leg., 1899, p. 246). The provisions of the act, which apply to the present case are those in Secs. 1–8, which are as follows:

"SECTION 1. Any corporation organized under the laws of this or any other State or country, and transacting or conducting any kind of business in this State, or any partnership, or individual, or other association of persons whatsoever, who *shall create, enter into, become a member of or a party to any pool*, trust, agreement, combination, confederation or understanding with any other corporation, partnership, individual or any other person or association of persons, *to regulate or fix the price of any article of manufacture*, mechanism, merchandise commodity, convenience, repair, any product of mining, or any article or thing whatsoever, or the price or premium to be paid for insuring property against loss or damage by fire, lightning or storm, or *to maintain said price* when so regulated or fixed, or shall enter into, become a member of or a party to any pool, agreement, combination, contract, association or confederation *to fix or limit the amount or quantity of any article* of manufacture, mechanism, merchandise, commodity, convenience, repair, any product of mining, or any article or thing whatsoever, or the price or premium to be paid for insuring property against loss or damage by

fire, lightning, storm, cyclone, tornado, or any other kind of policy issued by any corporation, partnership, individual, or association of persons aforesaid, shall be deemed and adjudged guilty of a conspiracy to defraud, and to be subject to the penalties as provided by this act."

"SECTION 8. It shall be the duty of the Secretary of State, on or about the first day of July of each year, and at such other times as he shall deem necessary, to address to the president, secretary or treasurer of each incorporated company doing business in this State a letter of inquiry as to whether the said corporation has all or any part of its business or interest in or with any trust, combination or association of persons or stockholders, as named in the preceding provisions of this act, and to require an answer under oath of the president, secretary and treasurer or any director of said company. A form of affidavit shall be enclosed in said letter of inquiry, as follows:

Affidavit.

STATE OF TEXAS, }
County of ..... }

I, ... do solemnly swear that I am the ..... (president, secretary, treasurer or director) of the corporation known and styled ....., duly incorporated under the laws of ....., on the ... day of ....., 19 ...., and now transacting or conducting business in the State of Texas, and that I am duly authorized to represent said corporation in making this affidavit, and I do further solemnly swear that the said ...., known and styled as aforesaid, has not since the ..... day of .... (naming the day upon which this act takes effect), created, entered into or become a member of or a party to, and was not, on the .... day of ....., nor at any day since that date, and is not now a member of or a party to any pool, trust, agreement, combination, confederation or understanding, with any other cor-

poration, partnership, individual, or any other person, or association of persons to regulate or fix the price of any article of manufacture, mechanism, merchandise, commodity, convenience, repair, any product of mining, or any article or thing whatsoever, or the price or premium to be paid for insuring property against loss or damage by fire, lightning, storm, cyclone, tornado, or any other kind of policy issued by the parties aforesaid; and that it has not entered into or become a member of, or a party to, any pool, trust, agreement, contract, combination or confederation, to fix or limit the amount of supply or quantity of any article of manufacture, mechanism, merchandise, commodity, convenience, repair, or any product of mining, or any article or thing whatsoever, or the price or premium to be paid for insuring property against loss or damage by fire, lightning, storm, cyclone, tornado or any other kind of policy issued by the parties aforesaid; and that it has not issued, and does not own any trust certificates for, any corporation, agent, officer, or employe or for the directors or stockholders of any corporation, has not entered into, and is not now in any combination, contract, or agreement with any person or persons, corporation or corporations, or with any stockholders, or directors thereof, the purpose and effect of which said combination, contract or agreement would be to place the management or control of such combination or combinations, or the manufactured product thereof, in the hands of any trustee or trustees, with the intent to limit or fix the price, or lessen the production and sale of any article of commerce, use or consumption, or to prevent, restrict, or diminish the manufacture or output of any such article; that it has not entered into any conspiracy, defined in the preceding sections of this act, to form or secure a trust or monopoly in restraint of trade; that it has not been since January 31, A. D. 1900, and is not now a monopoly by reason of any conduct on its part which would constitute it a monopoly under the provisions of Sections 2, 3, 4, 5, 6, 10 and 11 of this act, and is not the owner or lessee of a patent

to any machinery intended, used or designed for manufacturing any raw material, or preparing the same for market by any wrapping, baling or other proce.s, and while leasing, renting or operating the same refuses or fails to put the same on the market for sale; that it has not issued, and does not own any trust certificates, and has not, for any corporation or any agent, officer or employe thereof, or for the directors or stockholders thereof, entered into, and is not now in any combination, contract or agreement with any person or persons, corporation or corporations, or with the stockholders, directors or any officer, agent or employe of any corporation or corporations, the purpose and effect of which combination, contract or agreement would be a conspiracy to defraud, as defined in Section 1 of this act, or to create a monopoly, as defined in Section 1 of this act, or to create a monopoly, as defined in Sections 2, 3, 4, 5, 6, 10 and 11 of this act.

.....

President, Secretary, Treasurer or Director.

Subscribed and sworn to before me, a ..... within and for the County of ....., this .... day of ....., 19....

.....

[SEAL.]

And on refusal to make oath, in answer to said inquiry, or on failure to do so within thirty days from the mailing thereof, such failure shall be *prima facie* proof that such incorporated company is transacting business in the State of Texas, and has violated the provisions of this act, every day after the expiration of thirty days from the mailing of said letter of inquiry, the Secretary of State shall certify to the prosecuting attorney of the district or county wherein said corporation is located, and it shall be the duty of such prosecuting attorney, at his earliest practicable moment, in the name of the State, and at the relation of said prosecuting attorney, to proceed against such corporation, if a domestic corporation, for the recovery

> of the money forfeit provided for in this act, and also for the forfeiture of its charter or certificate of incorporation. If a foreign corporation, to proceed against such corporation for the recovery of the money forfeit provided for in this act, and to forfeit its right to do business in this State; and provided, that whatever money, bonds or other securities may be on deposit in this State shall remain subject to the decision of said Court to secure whatever penalties or costs may be adjudged against said corporation or individual. It is provided, however, that all parties making the affidavit provided for in this section shall be exempt from criminal prosecution for any violation of law that may be disclosed by such affidavit. It is further provided, that the Secretary of State shall, from time to time, when he may have reason to believe that individuals or partnerships are doing business in this State in violation of this act, address the letter of inquiry herein provided for to such individuals or partnerships and require of them the same answers under oath prescribed in this section for the officers of corporations, the affidavit to which must be made by the individual addressed, or some member of the partnership addressed; the form of affidavit herein prescribed, with such changes as may be necessary to make it applicable to individuals and partnerships shall be enclosed in said letter of inquiry."

Other sections of this act may be referred to for purposes of construction in discovering the intent and meaning of the terms used in these sections and in the affidavit.

It is plain that the affidavit, being in the form required by the statute, referred to the statute, and the language used by the appellant must be construed with reference thereto. This is the only possible meaning which can be ascribed to the reference in the affidavit to the otherwise unidentified "this act." The purpose of the sections of the statute quoted was, of course, to confine the privilege of doing business in Texas to corporations

which had not committed the acts denied by the affidavit, all of which acts were forbidden and rendered criminal by the other portions of the act. The form of affidavit prescribed by the statute substantially enumerated every act forbidden by the statute, and then denied the commission of them all. It follows, therefore, that the appellant, in making the statements contained in the affidavit, must be presumed to have had in mind the purpose of the statute, and to have used the terms employed by him in the same sense in which they are used in the statute.

These terms, however, are for the most part undefined by the statute. The primary thing denied by the appellant is that during the period mentioned, the Waters-Pierce Oil Company was not a member of or party to any pool, trust agreement, combination, confederation, understanding or contract to limit output or to control prices. None of these words "trust," "pool," "agreement," "combination," "confederation," or "understanding," or "trust certificate" are defined by the statute, yet all of them must here be taken as referring to the kind of combinations dealt with and forbidden by the act. The meaning of the statements made by the appellant, therefore, depends upon the true interpretation of the statute. He denies, not that his company entered into any sort of a combination, but merely that it entered into any of the combinations dealt with and forbidden by the statute.

The statute, however, is not universal in its application. It does not pretend to forbid all combinations and agreements which anywhere in the world may tend to the restriction of output or the control of prices. It is limited to combinations having these effects within the State of Texas. Since no State has any jurisdiction to legislate beyond the confines of its territory, it is a well settled rule that State statutes, even if they are not in terms limited to the territorial jurisdiction of the State, are to be construed as if such limitation were

expressed. This view of the matter is very tersely put by the Supreme Court of Arkansas in the case of *State* v. *Fire Insurance Company*, 66 Arkansas, 466; 51 S. W. Rep., 633 (Ark., 1899). Judge Wood, in the concurring opinion, uses this language:

> "The Legislature certainly did not intend to make a crime and punish the mere act of doing business in this State by a foreign insurance company, although a member of a pool or trust, whether in or out of the State; for the very gravamen of the crime is entering a pool or trust to fix the price or premiums to be paid for insuring property, etc. Now suppose the member of the pool or trust in the foreign state proposed to do business, and did business, in Arkansas on a strictly competitive basis, which tended to cheapen and lower the rates of insurance to the people of this State; could any dispassionate lawyer say that the Legislature intended by this act to punish such a beneficial and commendable deed as that? Certainly not. The Legislature manifestly was intending to correct an evil existing which affects, or might affect, injuriously the people of this State."

Again, though the language of this statute is very broad and apparently relates to all pools, trust agreements, combinations and confederations to regulate and fix the price or limit the quantity of an article of merchandise, &c., it is not every contract which falls within its provisions. The contract must be of that nature which restrains trade in the common law signification of that term.

For instance, the Supreme Court of Texas, in *Gates* v. *Hooper*, 90 Tex., 563, 39 S. W. Rep., 1079 (Tex., 1897), said:

> "When we consider the purposes for which the combination must be formed to come within the statute, the essential meaning of the word 'combination' and the fact that a punishment is prescribed for each day that the trust continues in existence, we are led to the

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> conclusion that the union or association of capital, skill or acts denounced is where the party in a particular case designed *the united co-operation of such agencies which have been otherwise independent and competing for the accomplishment of one or more of such purposes.*"

The Supreme Court of Texas in the case of the *State* v. *Shippers' Compress and Warehouse Company*, 90 Tex., 603, 69 S. W. Rep., 58 (Tex., 1902), in which the defendant was prosecuted under the Anti-trust law of 1895 for organizing a corporation to "create and carry out restrictions of trade and commerce," said:

> "Competition between compresses is not probable and barely possible under these rules (referring to rules established by Railroad Commissioner concerning rates.) There being no competition between any of the compresses purchased by the defendant corporation, competition was not destroyed or restrained. It did not exist."

As was said in the case of *Phillips* v. *Iola Portland Cement Company*, 125 Fed. Rep., 594, speaking in respect of such contracts as are in restraint of trade:

> "It is now settled by repeated decisions of the Supreme Court that the test of the validity of a contract, combination, or conspiracy challenged under the anti-trust law is the direct effect of such a contract or combination upon competition in commerce among the States. If its necessary effect is to stifle competition, or to directly and substantially restrict it, it is void. But if it promotes, or only incidentally or indirectly restricts competition in commerce among the States, while its main purpose and chief effect are to foster the trade and enhance the business of those who make it, it does not constitute a restraint of interstate commerce within the meaning of that law, and is not obnoxious to its provisions. This act of Congress must have a reasonable con-

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> struction. It was not its purpose to prohibit or to render illegal the ordinary contracts or combinations of manufacturers, merchants and traders, or the usual devices to which they resort to promote the success of their business, to enhance their trade, and to make their occupations gainful, so long as those combinations and devices do not necessarily have a direct and substantial effect to restrict competition in commerce among the States."

The Sherman Anti-trust Act, which the Court was there considering, is not less general in its terms than the first section of the Act of Texas which we are considering, and the purposes of both acts appear to be the same. The same Court again, in *Whitwell* v. *Continental Tobacco Company et al.*, 125 Fed. Rep., 454, affirmed the same doctrine, quoting liberally from decisions of this Court to sustain it.

The plain deduction from all of these decisions is this: That it is not every contract or arrangement fixing the price or limiting the quantity of merchandise or restraining in some measure commerce, that is prohibited by the law. Whether they are prohibited is a question for judicial determination after the essential facts are disclosed by the pleading. A manufacturer may very properly enter into an agreement with his factor fixing the price of his products or limiting the output through that agency. Such a contract would not offend against any anti-trust law, or especially the anti-trust law of Texas, which we have under consideration.

The contracts denounced are those, to quote from the language of the Supreme Court of Texas in *Gates* v. *Hooper*, *supra*, " where the parties in a " particular case designated the united co-operation " of such agencies which might have been otherwise " independent and competing for the accomplish- " ment of one or more of such purposes." That is, the purposes prohibited by the law.

The statement by the appellant, therefore, that the

Waters-Pierce Oil Company never entered into any of the unlawful forms of combinations mentioned, involved, in fact, a review of all the transactions of his company during the period in question, a consideration of the net legal effect of each and a pronouncement that in the opinion of the appellant no one of the arrangements made by his company amounted to a pool trust, or other combination, such as was rendered unlawful by the statute.

Even, however, if it were not necessary to construe the affidavit in connection with the statute, the first two statements made by the appellant in the affidavit as above quoted would necessarily be held to be statements of conclusions such as could not form the basis of an indictment for false swearing. In a large number of cases of prosecution for violation of the anti-trust laws of the various States and of the United States, indictments following the language of the act and alleging that the defendants entered into such combinations, without specifying the acts or agreements whereby they did so, have been held not to charge a crime. Thus in *In re Green*, 52 Fed., 104, which was a proceeding by *habeas corpus* to release the petitioner who had been arrested upon a removal-warrant which was based upon an indictment framed under the Sherman Anti-trust Law of July 2, 1890, Mr. Justice Jackson, then Circuit Judge, in holding the indictment bad, said:

> "We regard it as well settled by the authorities that an indictment following simply the language of the act would be wholly inefficient for the reason that the words of the statute do not of themselves fully, directly and clearly set forth all the elements necessary to constitute the offense intended to be punished. * * * If the particular acts or facts charged do not as a matter of law constitute contracts, combinations or conspiracies in restraint of trade and commerce among the several States or a monopoly or attempt to monopolize any part of such trade or commerce, no amount

> of averments and allegations that the accused 'engaged in the combination' or 'made contracts in restraint' of such trade or commerce or 'monopolized' or 'attempted to monopolize' the same will avail to sustain the indictment. Whether the accused is charged with an offense *is to be determined by the particular acts or facts set forth*, and not by the conclusions of the pleader, although asserted in the words of the statute, 'Every offense consists of certain acts done or omitted under certain circumstances, and in the indictment for the offense it is not sufficient to charge the accused generally with having committed the offense, but all the circumstances constituting the offense must be specially set forth.'"

And in discussing whether the averments of the several counts of the indictment then under consideration showed a contract, combination or conspiracy in restraint of trade, the Court said:

> "It is not alleged how said Boston purchasers were 'compelled' to sell at the prices fixed by the defendants, nor how or under what arrangements the defendant fixed the price at which the alcohol should be sold in Massachusetts, or for transportation therefrom. Was it one of the provisions of the contract of sale and purchase, or was it by a combination or conspiracy between the defendants and the Boston purchasers? The means described by which the defendants were enabled to fix the price at which the purchasers should sell the alcohol was certainly not a 'contract, combination, or conspiracy in restraint of trade and commerce among the States.' If they, by force or duress, 'compelled' the purchasers to sell at a price fixed by them, such compulsion would not constitute either a contract, combination, or conspiracy in restraint of trade. It cannot be assumed, under the language employed in this count, that there was any 'contract' beteen the defendants and Mills and Gaffield which by its terms and provisions restrained

> the latter in respect to the price at which they should or did sell the alcohol. The Court certainly charges no 'combination or conspiracy' within the meaning of the act, between the defendant and the Boston purchasers. The charge is too vague and general to show a 'contract' in restraint of trade, such as the first section of the Act contemplates and declares illegal. It cannot be aided by presumption or intendments. It is bad upon its face, and charges no offense committed in the State of Massachusetts of which the United States Courts in that State could take jurisdiction."

So also

> *In re Terrell*, 51 Fed., 213;
> *In re Corning*, 51 Fed., 205;
> *Gage* v. *State*, 24 Ohio Cir. Rep., 724;
> *State* v. *Witherspoon*, 115 Tenn., 138;
> *U. S.* v. *B. and O. R. R. Co.*, 153 Fed., 997.

These decisions establish conclusively that a statement to the effect that a corporation did or did not engage in a combination, pool, trust, contract or undertaking, the purpose of which was to limit output or control prices, is not an allegation of fact but a mere conclusion. As such, whether it be correct or incorrect, no prosecution for false swearing can be predicated thereon.

The same reasoning requires a decision that the third statement above quoted from the appellant's affidavit, in which he denied that the Water Pierce Company had issued trust certificates for certain purposes, was a statement of opinion rather than of fact. This is a denial not that trust certificates were ever issued, but that any which may have been issued had certain practical tendencies and certain legal effects.

The absurdity of the attempt to predicate upon such allegations, the crime of false swearing, can be shown most glaringly by condensing into a single sentence—as is readily possible—the whole substance

of the appellant's affidavit. What he swore, in effect, was: "None of the transactions of my company, during these three months, has 'been in violation of the Anti-trust Law of Texas." It would be hard to imagine an assertion which would be more clearly a statement of a legal opinion as distinguished from a statement of fact. Upon such an affidavit no valid indictment could possibly be based.

(B.)

The assignments of falsity are insufficient. No facts are alleged which are necessarily inconsistent with the statements of the appellant's affidavit.

Stripped of some of their verbiage, the assignments allege, as truths perjuriously denied by the affidavit,

(1.) That on every day from January 31, 1900, to May 31, 1900, the company had created or entered into a pool, trust, agreement, combination, confederation and undertaking with the various Standard Oil Companies, with J. D. Rockefeller, J. D. Archbold, H. G. Rogers and others unknown, to regulate and fix the price of petroleum.

(2.) That at the same times, with the same companies and individuals and with other unknown persons the company had created or entered into a similar pool, trust, agreement, combination, confederation and untaking to limit production.

(3.) That at the same times the company issued "trust certificates" to the Standard Oil Company of New Jersey, to J. P. Gruet, to John D. Johnson and to other unknown agents and officers of the Standard Oil Company, whereby the Standard Oil Company became the owner of a majority of the stock of the Waters-Pierce Oil Company.

The first two of these assignments are substantially similar, and both fall plainly under the condemnation of the rule laid down by Mr. Justice Jackson in *In re Green*, *supra*, and the cases cited in connection therewith. The allegations that the Waters-Pierce Company became a party to a pool, trust, agreement, &c., for a particular purpose, state no acts of the Waters-Pierce Company, but only a legal interpretation of the result of its acts. In essence, they amount to a statement that the Waters Pierce Company entered into certain contracts (whether one or innumerable is not stated) which together had a certain net legal effect. There is no statement of the terms or even of the substance of so much as a single contract. Nothing whatever appears except the conclusion of the pleader, from which the Court can even surmise whether any transaction between the Waters-Pierce Company and the companies or persons named amounted to a pool, trust, agreement, combination, confederation, or undertaking, or whether, if so, it was reasonably calculated to limit output or control prices. In short, these two assignments allege no facts whatever. They could not suffice even as a charge of the crime of entering into such an unlawful combination. How much more, therefore, must they be held insufficient where, as in an indictment for false swearing, the requirement is not merely that they state facts, but that they show facts necessarily and completely inconsistent with those stated by the accused.

The learned Circuit Court apparently held that these two assignments stated facts rather than mere conclusions, but the fallacy of the reasoning leading to this result, can, we submit, be demonstrated on the face of the opinion below. The learned Judge said (Record, p. 27):

> There might be force in the "argument of
> " petitioners' counsel that the charge is based
> " on a mere expression of opinion, and not on
> " facts, if affiant had sworn as to the meaning

> " or legal significance of some existing agree-
> " ment or contract: but such is not the case.
> " He swore to the fact that the company had
> " no agreement whatsoever with any other
> " corporation or persons, fixing the price or
> " limiting the product of a manufactured
> " article. It is not apparent how that single
> " fact could be amplified by any statement of
> " the terms of an agreement when the ex-
> " istence itself of any *such* agreement is
> " denied."

We have italicized the word "*such*" in the last line of this statement because it shows the fallacy at a glance. The affidavit denies not that the company entered into any agreement, but that it entered into any "*such*" agreement. This denial is therefore equivalent to an expression of opinion as to the legal effect of each and all of the agreements which may have been made between the Waters-Pierce Company and the other persons or corporations concerned. It says: " none of the company's agree-
" ments were 'such' agreements, none of them
" were reasonably calculated to fix prices or limit
" output." How could any assertion be more plainly a statement of opinion, a conclusion, as distinguished from a statement of fact? Yet this denial and the assertion in the assignments contradicting it seem to have been the sole allegations in the indictment which Judge Adams regarded as allegations of fact.

Even, however, if these assignments could be held to allege facts, no necessary inconsistency is shown between the facts so alleged and those stated in the affidavit. The affidavit must, as we have seen, be construed in the light of the anti-trust law which prescribed it. The appellants must, therefore, be held to have denied only that the Waters-Pierce Company had entered into the sort of combination forbidden by that statute—that is, combinations with persons engaged in the State of Texas in the merchandise or manufacture of petroleum, or the products of petroleum. The assignments, however, do not aver that any of the persons or corporations

with whom the Waters-Pierce Company is alleged to have formed illegal associations were engaged in the merchandise or manufacture of petroleum or its products, or were engaged in business of any kind in Texas. All that the appellant can justly be held to have said in his affidavit was: "My company has not combined with "other Texas oil merchants or manufacturers "to control prices or limit output in Texas." To this the indictment answers only: "Your company "has combined with certain persons to limit output "and control prices." The answer is obviously incomplete. It may mean no more than that the Waters-Pierce Company combined with persons not engaged in Texas in the oil business to control prices or limit output somewhere outside of Texas. Indeed, since facts not alleged in an indictment must be presumed not to exist (*State* v. *Barbee*, 136 Mo., 440), this must be the true interpretation of these assignments; which are thus perfectly consistent with the statements of the affidavit. Neither of these assignments, therefore, impugns in any sense the truth of the appellant's affidavit.

The third assignment is really unworthy of serious attention. It alleges: that the Waters-Pierce Company issued trust certificates to agents of the Standard Oil Company of New Jersey, whereby the Standard Oil Compay became owner of a majority of the stock of the Waters-Pierce Company. If this allegation has any meaning whatever, it is simply that the Waters-Pierce Company issued certificates for its shares of stock to agents of the Standard Oil Company, whereby it became the owner of the majority of the shares of stock of the Waters Pierce Company. It is sheer nonsense to say that stock certificates were "trust certificates" within the meaning of the Texas Anti-trust law, or of the appellant's affidavit. If so, every corporation is a trust, and, when it issues its stock-certificates, it violates the anti-trust laws of all the states.

Whatever it means, however, this assignment

wholly fails to contradict anything in the appellant's affidavit. The affidavit asserts only that the Waters-Pierce Company has not, in combination with other corporations or individuals, *issued trust certificates, the purpose of which* " would be to place the man- " agement or control of such combination or combi- " nations in the hands of any trustee or trustees, " with the intent to limit or fix the prices," or control the output of anything, *and that it has not issued trust certificates, the purpose of which* was to form a combination which " would be a " conspiracy to defraud, as defined by Section 1 of " this Act or to create a monopoly as defined in " Sections 2, 3, 4, 5, 6, 10 and 11 of this Act." The appellant, therefore, never denied that his company issued trust certificates which had the effect of transferring its stock to a New Jersey corporation; so that even if such a transaction be not a mere contradiction in terms, but an actual fact, everything said by the appellant on the subject would still be true.

Each of these assignments, therefore, and consequently the indictment as a whole, fails to state facts which show that the appellant swore falsely, and thus fails to constitute a substantial " charge of crime."

(C.)

The indictment fails to inform appellant of the charge against him with that degree of reasonable certainty which will enable him to prepare his defense.

It is, and at the time of the adoption of the Constitution it was, a fundamental requirement—demanded alike by the common law, the statutes and the constitutions of all the states and of the United States—that an indictment should allege the crime with sufficient certainty to enable the defendant to know what he must be prepared to prove, in order to make out his defense. No indictment

which fails to fulfill this requirement can, even if it be sufficient in the state where found, be an indictment such as is required by § 5278, R. S., or a charge of crime within the meaning of the Constitution. As was said by the Supreme Court (per Harlan, *J.*) in *Rosen* v. *U. S.*, 161 U. S., 30:

> "The doctrine to be deduced from the "American cases is that the constitutional "right of the defendant to be informed of "the nature and cause of the accusation "against him, entitles him to insist at the "outset by demurrer or by motion to quash, "and after verdict my motion in arrest of "judgment that the indictment shall apprise "him of the crime charged with such reason-"able certainty that he can make his defense "and protect himself after judgment against "another prosecution for the same offense."

The rule is also well stated by Putnam, *J.*, in *U. S.* v. *Potter*, 56 Fed., 83, at pp. 89-90:

> " The accused must receive sufficient infor-" mation to enable him to reasonably under-" stand, not only the nature of the offense, " but the particular act or acts touching which " he must be prepared with his proof; and " when his liberty, and perhaps his life, are " at stake, he is not to be left so scantily in-" formed as to cause him to rest his defense " upon the hypothesis that he is charged with " a certain act or series of acts, with the " hazard of being surprised by proofs on " the part of the prosecution of an entirely " different act or series of acts, at least so far " as such surprise can be avoided by reason-" able particularity and fullness of description " of the alleged offense."

So, also, *U. S.* v. *Cruikshank*, 92 U. S., 542. Although in each of these cases the point at issue was whether or not an indictment was sufficient under the requirements of the fifth and sixth amendments to the Constitution of the United States, they are,

nevertheless, precisely in point upon the present question. In the case at bar the extradition was unauthorized unless the document submitted to the Governor of Missouri was an "indictment" within the meaning of Sec. 5278, R. S. Since this statute was enacted on February 12, 1793, less than fourteen months after the final ratification of the fifth and sixth amendments, the word "indictment" must be presumed to have been used in the same sense in the statute as in the amendments. The requirements of an indictment, therefore, are the same under Sec. 5278, R. S., as they were under the amendments considered by the Court in these decisions, so that an indictment insufficient under the constitutional amendments must be held insufficient under the contemporary statute. Moreover, the statute is substantially contemporaneous with the Constitution itself, and by the requirement of an indictment as proof of the existence of a charge of crime, clearly indicates that the charge contemplated by the Constitution as a pre-requisite to extradition must have been substantially similar to that required for a prosecution by indictment in the Federal courts. These decisions establish, therefore, that entirely irrespective of the law of the demanding State, an indictment which fails to inform the accused sufficiently to enable him to frame his defense, is incapable of supporting a warrant of extradition.

In an indictment for false swearing or perjury it is universally held that the assignments of falsity must be distinct enough for this purpose.

State v. *Nelson*, 74 Minn., 409; 77 N. W., 223.

State v. *Webber*, 78 Vt , 463.

Shackelford v. *Comm.*, 25 Ky. Law, 1830; 79 S. W., 192.

Bartlett v. *U. S.*, 106 Fed., 884.

U. S. v. *Pettus*, 84 Fed., 791.

Rex v. *Hepper*, Ryan & Moody, 210.

Whether or not this requirement has anywhere been relaxed, it is still strongly maintained in Texas. In *Gabrielsky* v. *State*, *supra*, the Court in discussing the prosecution on this ground, said:

> " We think that the assignment of the " perjury is an important and essential " portion of the indictment, more especially " where, as in this case, the alleged false matter " consists of several distinct and separate propo- " sitions. *It is a constitutional right of the* " *defendant to be informed by the indictment,* " *in plain and intelligible words, of the* " *nature of the charge against him, and with* " *that degree of reasonable certainty which* " *will enable him to prepare his defense.* He " should be told in the indictment wherein " and to what extent the statements alleged " to have been made by him were false, that " he may know certainly what he is called " upon to answer. We think the indictment " in this case, in this respect, is fatally de- " fective, and, although it would, perhaps, " be a sufficient indictment under the form " prescribed in the act known as the 'Com- " mon Sense Indictment Act' (Acts Seven- " teenth Legislature, p. 62, Form No. 13), we " think that form is itself insufficient and in " valid, for the reasons stated by this Court " in *Williams* v. *The State*, 12 Texas Ct. " App., 395."
>
> *McMurtry* v. *State*, *supra*.
> *Higgins* v. *State*, *supra*.
> *Morris* v. *State*, *supra*.
> *Turner* v. *State*, *supra*.

In the case at bar, as in all prosecutions for false swearing, the proof which the accused would have to meet would be proof in support of the assignments of falsity. Here the charge against the appellant (if the indictment were valid) would be made out by proof that the allegations of the assignments were true. This indictment would permit the State to offer, as proof that the appellant's statements were false, evidence of any one or more of an

incalculable number of transactions between any of the numerous agents of the Waters-Pierce Company and any agent of the other companies or persons mentioned, in any place, at any time within three months, and if it could show that the transactions so proved established a pool or trust to control prices or limit output, the conviction of the appellant would follow. In order to defend, the appellant would have to be ready with evidence as to the true nature and effect of any and every transaction, anywhere, of the Waters-Pierce Company, and of all its agents, and also with evidence as to the authority of persons who might have assumed to act as its agents. Any contract or agreement proved by the State, might, if unexplained, serve to convict, though if the accused had at his disposal evidence to show its true nature, it would appear altogether innocent. To such an indictment, no accused person, however innocent, could adequately prepare his defense.

This argument was advanced, on behalf of the appellant, in the Court below, and was there met by the learned Judge in his opinion (p. 27) by the suggestion that the statute of Texas (Penal Code, Art. 448) permitted an indictment of the character here in question. That article reads as follows:

> "An indictment for any offense against the
> "penal laws of this State shall be deemed
> "sufficient which charges the commission of
> "the offense in ordinary and concise language
> "in such a manner as to enable a person of
> "common understanding to know what is
> "meant."

This article, however, does not attempt to dispense with the requirements that the indictment shall enable the defendant to know what he must meet in order to defend. If it did, it would be void. It is well settled in Texas, as in other jurisdictions,

that any statute which seeks to dispense with this requirement is unconstitutional.

Gabrielsky v. *State*, *supra*.
Williams v. *State*, 12 Texas Crim. Ap., 395.
Brinster v. *State*, 12 Texas Crim. Ap., 612.
Allen v. *State*, 13 Texas Crim. Ap., 28.
Flores v. *State*, 13 Texas Crim. Ap., 337.

Hewitt v. *State*, 25 Texas, 722.
State v. *Duke*, 42 Texas, 455.
Davis v. *State*, 20 Tex. App., 302.
Caldwell v. *State*, 28 Tex. App., 581.
State v. *Nelson*, *supra*.
State v. *Webber*, *supra*.

Such a statute is not only unconstitutional under the Texas Constitution, but void under the Constitution of the United States, as denying to the defendant due process of law.

Huntsman v. *State*, 12 Tex. App., 619.

From these considerations it is apparent that, even if this indictment were held to allege that the appellant had sworn to statements on which the crime of false swearing could be predicated, and also to allege facts which show such statements to have been false, it would still, whether tested by the law of the demanding state or by the Federal Constitution and statute alone, fail to constitute a legal "charge of crime" on which extradition could be based. The reasoning of the cases cited establishes beyond question that the requirement of certainty is no mere formal or technical requisite of an indictment as a pleading, but is an essential element of the legal statement of the crime.

(D.)

The indictment discloses upon its face that, at the time it was filed, the prosecution was barred by the Statute of Limitations.

The indictment appears to have been found at the September Term in 1906. The affidavit upon which the false swearing was predicated was verified on May 31, 1900, more than six years before. It is perfectly well settled in Texas that an indictment, the allegations of which permit the inference that the Statute of Limitations has run against the crime charged, is absolutely void even after conviction. This doctrine is based on Article 429 of the Texas Code of Criminal Procedure, which provides that the time mentioned in the indictment

> "must be some date anterior to the present-
> "ment of the indictment and not so remote
> "that the prosecution of the offense is barred
> "by limitation."

This statute is applied by the Texas courts with the utmost strictness.

> *Harwell* v. *State*, 65 S. Western, 520.
> *Hickman* v. *State*, 44 Tex. Crim. Ap., 533; 72 S. W., 587.

In the latest case of the series, *Stephens* v. *State*, 103 S. W., 904, decided on May 1, 1907, in the Texas Court of Criminal Appeals, a conviction of theft was reversed *on a rehearing* after the judgment had been affirmed upon the merits, on the original argument, though the defect in the indictment was merely the allegation that the offense was committed on an impossible date (June 31). It appears, therefore, that in Texas the Statute of Limitations is not an affirmative defense and that no crime can legally be charged except by allegations which show that the statute has not run.

(E.)

The indictment itself discloses the fact that it was not found in good faith.

Although the uncontradicted portion of the affidavit expressly alleges that the Waters-Pierce Company was incorporated only on May 29, 1900, the assignments of falsity allege that the company had been guilty of false acts on every day from January 31, 1900, to and including May 31, 1900, and that the appellant swore falsely in denying that on any of those days any such unlawful acts were committed. Obviously, an affidavit which in its very first statement alleges that the corporation for which it is made has only been in existence for two days cannot possibly be held to have stated that the corporation did or did not perform acts prior to the date of its incorporation. The assignments, in other words, are on their face ninety-nine per cent. undiluted falsehood. It would be hard to imagine a clearer indication of bad faith. Such a defect renders an indictment void even if there is a residue of its allegations which may be true (*State* v. *Ela*, 91 Me., 309). An indictment which is obviously not a part of a prosecution begun as an honest attempt to punish an offense cannot be a substantial charge of crime.

U. S. v. *Pope*, 27 Fed. Cases, No. 16,069.

(F.)

The indictment is based upon an affidavit required by law, which cannot be the subject of a prosecution for the statutory crime of false swearing.

As we have already pointed out, the appellants' affidavit was that which by Section 8 of the Texas Anti trust Law (*supra*) is required of all cor-

porations. Where an oath is so required, an affidavit made under it cannot, even if false, be the basis of of an indictment for false swearing.

O'Brien v. *State*, 11 S. W., 442.

IV.

The judgment and order appealed from should be reversed and the appellant discharged from custody.

JOSEPH H. CHOATE,
HENRY S. PRIEST,
JOSEPH H. CHOATE, Jr.,
Of Counsel.

Office Supreme Court, U. S.
FILED.
APR 20 1908
JAMES H. McKENNEY,
CLERK.

Supreme Court of the United States

OCTOBER TERM, 1907

No. 357

HENRY CLAY PIERCE, *Appellant*

vs.

E. P. CREECY, Chief of Police, *Appellee*

STATEMENT AND BRIEF FOR APPELLEE

F. J. McCORD
Assistant Attorney General of Texas,

THOMAS T. FAUNTLEROY
SHEPARD BARCLAY
Counsel for Appellee and for
The State of Texas

Supreme Court of the United States

OCTOBER TERM, 1907

No. 357

HENRY CLAY PIERCE, *Appellant*

vs.

E. P. CREECY, Chief of Police, *Appellee*

STATEMENT FOR APPELLEE

THE PETITIONER filed a petition for *Habeas Corpus* in May, 1907, before Hon. ELMER B. ADAMS, Circuit Judge. The ensuing proceedings, ending by a judgment **remanding the petitioner,** are fully given in the report of the case there.

Ex parte Pierce, 155 Fed. 663

Nov. 1, 1906, the **petitioner was indicted** by the GRAND JURY of Travis County, Texas, upon a **charge of willfully making a voluntary false affidavit** (which is recited at length in the indictment).

In February, 1907, GOVERNOR CAMPBELL, of Texas, issued a **requisition** which was duly honored by GOVERNOR FOLK, of Missouri, who issued a warrant for the arrest and delivery of petitioner to Hon. G. S. Mathews, agent of Texas.

The petitioner was accordingly arrested and in custody of the Appellee, Hon. E. P. Creecy, as Chief of Police of St. Louis, long enough to institute the *Habeas Corpus* proceedings, and to give bail thereunder, after which a hearing took place before Judge ADAMS. The petitioner was then remanded to custody. He appealed from that judgment to the SUPREME COURT, and later took another appeal to the CIRCUIT COURT OF APPEALS FOR THE 8TH CIRCUIT.

Both appeals are pending now.

Dec. 17, 1907, the cause was **continued** in the Court of Appeals to the May Term, 1908, where the appeal is set for hearing, May 4, 1908, as this Court has been informed by learned counsel for appellant in the **Motion to Advance** (p. 11) which fact we admit.

Feb. 3, 1908, the SUPREME COURT **denied** a petition of appellant in the second appeal for a *certiorari* to remove same to this Court.

In April, 1908, petitioner filed a **motion to advance** the appeal for hearing in this Court, which motion was **granted.** The cause was then set for hearing, April 20, 1908, the appellee **consenting to that order.**

The Charge

which the indictment makes against petitioner is one distinctly defined by the laws of Texas.

Penal Code (Texas) Art. 209; and Code of Crim. Proced., Art. 752, sec. 7

Other sections of the Texas Code of Criminal Procedure (Arts. 751 and 752 sec. 7) sanction a verdict in either degree upon a charge of perjury which includes false swearing.

There has been as yet **no suggestion** of any irregularity in the formal steps for extradition.

The nearest approach to the statement of a federal question is formulated in one of the learned briefs for appellant in this Court wherein it is said (Brief of appellant for *Certiorari*, pp. 3–4) that the "defect pointed out" in the proceedings was that the petitioner was not "a person charged with crime", within the true meaning of the Constitution and statutory provisions authorizing extradition.

The foregoing is a sufficient outline of the facts for present purposes, taken together with the petition for the writ, and the learned opinion of Judge ADAMS.

JOINDER

The appellee by his counsel comes and says that there is **no error** in the record and proceedings in this cause in the Circuit Court of the United States, in and for the Eastern Division of the Eastern District of Missouri, and before Hon. ELMER B. ADAMS, as Circuit Judge thereof, and appellee prays that the judgment or order remanding the petitioner be affirmed.

F. J. MCCORD,
THOMAS T. FAUNTLEROY,
SHEPARD BARCLAY,
Of Counsel for Appellee, and for
The State of Texas.

BRIEF OF THE ARGUMENT

I

NO FEDERAL JURISDICTION

This Court will naturally first satisfy its own inquiry as to the reach of its jurisdiction and will determine whether the sufficiency of the **charge** made by the Grand Jury of Travis County, Texas, is open to investigation here.

Our claim for appellee has been, from the outset, that there was no merit or substance whatever to the contention that the case presents any federal question; and, still less, any issue for the **construction or application** of the **Constitution or laws** of the United States.

A glance at the petition for *habeas corpus* shows that after an introductory claim that petitioner is detained **"in violation of the laws and Constitution of the United States"**, there follows a clean group of specifications of *particulars* on which that claim rests; five assignments of supposed defects in the **indictment** (not in the CHARGE). **No one** of these specifications of supposed defects involves the construction or application of the Constitution or of any law of the United States; **no one** of them **invokes or asserts** any right, privilege or immunity, real or fancied, under the federal Constitution or laws.

World's Exposition v. U. S., 56 Fed. 657
Mining Co. v. Hanley, 205 U. S. 233
Carfer v. Caldwell, 200 U. S. 292

As the case is presented by the petition for *habeas corpus*, it calls only for an **interpretation of the laws**

of Texas, and for a ruling upon the sufficiency of the indictment measured by the standards afforded by the laws of Texas.

Only Texas Law Involved

If the petitioner possesses rights protected by federal law, organic or statutory, they have as yet not been formulated in a way to indicate their relation to the charge made under the Texas law. If such rights exist and are claimed, in some appropriate manner, they may be fully protected by methods of recognized procedure available to petitioner under the local and the federal laws. As yet no such federal right has been invoked, we submit, with all due respect.

The petitioner in the application for *habeas corpus* assigns the **"illegality"** of his detention "*in this, to-wit*" (to quote the petition):

> 1st. That the **"Indictment charges** NO OFFENSE **under the** LAWS OF THE STATE OF TEXAS" because it is not "*shown by any sufficient averments*" that the facts stated or opinions in the affidavit (set forth in the indictment) **"were false when the said affidavit was made".**
>
> 2nd. That the indictment is insufficient to bring the case within the terms of the **Texas statute** "to prohibit pools, trusts," etc.
>
> 3rd. "That no charge of perjury or false swearing could legally be predicated upon any matter or thing stated in said affidavit, for the reasons that the statements therein contained are mere **expressions of legal conclusions or opinions,**" etc.
>
> 4th. "The affidavit being required by law, if false, could not be false swearing *under the laws of the* **State of Texas.**"
>
> 5th. "For that it appears on the face of the said Indictment that **more than four years elapsed** between the date of the commission of the alleged offense and the finding of the said Indictment" (Printed Record, pp. 6–7).

The **federal question,** which learned and eminent counsel for appellant would fain extract from these allegations, is that the petitioner is not **"a person charged with crime"**, within the meaning of the Constitution and laws of the United States. The inferences which we draw from the same allegations are that the petitioner appears to be **very much charged** with crime, and that the **only question** raised, by the petition for *habeas corpus*, is whether the charge is **sufficiently** alleged in the indictment, under the **laws of Texas.**

When those laws are thus invoked to furnish a touchstone of validity it is but fair to inquire what is the general scope and effect of those laws in permitting a cure or amendment of deficiencies if they, in fact, exist in the indictment as claimed. We do not concede for a moment any insufficiency therein, either in matters of form or substance, but if any were found and discovered, even so late as **upon motion in arrest** of judgment, the **charge** is susceptible of amendment then by process of **new indictment;** for the Court is authorized (on sustaining a motion in arrest) to remand the defendant into custody to answer another indictment.

Texas Code Crim. Proced., Art. 829

The **charge** of crime is regarded by the law of Texas as in other States, as a matter quite apart from the **form** in which it is expressed, provided the substance of the charge is within the purview of the criminal law.

The organic and statutory law of the United States, touching extradition between the States, **does not require an indictment** as a basis for extradition. The terms of the Constitution refer to "a person charged in any State with crime" (Art. 4, sec. 2). A **charge**

of crime may be made **without any indictment.** The Federal law distinctly recognizes this proposition. Note the terms of the extradition act, which sanction extradition process upon

> "an indictment found or **an affidavit made before a magistrate** of any State or Territory, **charging the person demanded with having committed** treason, felony, **or other crime,** certified as authentic by the Governor or Chief Magistrate of the State or Territory from whence the person so charged has fled", etc.
>
> R. S., U. S., sec. 5278

A mere **charge** of a crime, defined by the criminal law of a State, formulated upon affidavit before some magistrate, without indictment by a grand jury, is a sufficient basis for extradition, under the federal law.

Day v. Inhabits., 8 Allen 478

In a pioneer case in Missouri, wherein it was claimed that a **charge of crime** should be held to require the charge to be made by a grand jury, the Court responded:

> "The argument of counsel is, that the words 'charged with crime and confined in jail', mean that the Court can only be ordered where the person is charged on the oath of a grand jury, arrested and in jail on that charge. I admit that **an indictment by a grand jury is a charge of crime;** but it also seems to me that where a person is **charged on the oath of some witness,** and a warrant is issued, and a party brought before a magistrate and by him committed to prison for safe keeping, that **such person is charged with crime** in solemn form of law, although it is true that a charge by indictment makes the charge still more solemn."
>
> Mary v. State, 5 Mo. 79

Other cases likewise hold that a **charge** of crime need not be by indictment.

Ryan v. People, 79 N. Y. 593
Drinkall v. Spiegel, 68 Conn. 441
In re De Giacomo, 7 Fed. Cas., p. 366
People v. Garnett, 129 Calif. 364
Rex v. Maymard, Russ. & Ry. 240

In the light of these rather obvious precepts, examine for a few moments the scope of federal jurisdiction to see if it reaches and includes the claim advanced with so much learning and ability on behalf of the appellant!

The federal Constitution does not forbid or seek to check the exercise of the right of any State of the Union to extradite fugitives from justice "**charged** with crime" in other States.

The right of extradition, we venture to hint, may be exercised between States, with the consent of both, **unaffected by the provisions of the Federal Constitution.** The terms of the latter are designed to **promote and compel** extradition in the circumstances described, so that "a person **charged** in any State" with crime, and who flees to another State, **shall** "**be delivered up** to be removed to the State having jurisdiction of the crime." There is no word in that section or in the statute defining the procedure (sec. 5278) which limits the powers of the States in respect of extradition of persons **charged** with crime, where the States accord to each other that right.

In the case at bar, Governor CAMPBELL of Texas issued a requisition for extradition of the petitioner; Governor FOLK of Missouri recognized the demand, and caused the arrest of the accused, and the latter would long

since have been before the court of the indictment but for the check of the proceedings, interposed in the name of federal law.

There was and is no claim of any right or immunity by petitioner except that he is said **not to be** "a person charged with crime". We answer, with much respect, that, in the manner and form in which that claim is advanced by his petition for *habeas corpus*, there is nothing of federal law to construe, and that the federal laws do not, in any sense, **forbid** extradition **by consent of the two States affected thereby,** upon terms satisfactory to them, where no right or immunity secured or protected by the federal laws is infringed or invaded.

The assignments of defects in the indictment raise no true or substantial federal question for the application or construction of any federal law or of the Constitution.

Every contention of illegality must be solved by interpretation of Texas law. Who shall make the interpretation? In the first instance, at least, the courts of that Commonwealth. The real issue of law is what the duly appointed courts of Texas *hold* as to the sufficiency of the Indictment.

In re Voorhees, 32 N. J. L. 141

If those courts should err in the interpretation of their local enactments, the case **would not thereby become one of Federal cognizance,** unless in such ruling (or in the consequences thereof) some right, privilege, or immunity secured to petitioner by the Federal law was infringed. No such claim appears as yet and if it did, *habeas corpus* is rather a collateral method of raising such an issue. The petition for *habeas corpus* asserts

that the indictment is insufficient **according to the Texas law.** Perhaps the courts of that State will agree with the petitioner! Will the Federal judiciary, **in advance of any Texas interpretation of Texas law,** interpose and assume that duty?

Carfer v. Caldwell, 200 U. S. 292
In re Lennon, 150 U. S. 393

The order of the learned Circuit Judge remanding the petition was correct. Indeed, it was the only proper order to be made in the circumstances.

Ex parte Moebus, 148 Fed. 39
Storti v. Mass., 183 U. S. 142

Petitioner's sole plea was, and is, that the **indictment is insufficient under the laws of Texas.** If that is so, it does not oust the jurisdiction of the local court (in which is the indictment) to act upon the **"charge".**

R. S. U. S., sec. 5278
Spencer v. Silk Co., 191 U. S. 530

The jurisdiction of the Court in Texas to take cognizance of the **charge** is created by the laws of that State. If the indictment is really insufficient, a new one would be in order, for then the defendant might be **held for a new indictment.**

The **jurisdiction of the Court** to deal with the **"charge"** is not ousted by insufficiency. An **indictment** may be **amended** in that State in respect of **"any matter of form"**; a practice not authorized in some other States.

Texas Code of Crim. Proced., Arts. 587–8; 464

There is no solid ground to support a claim of **want of power or jurisdiction** in the Texas court to entertain

and adjudicate the charge in the indictment or to determine the sufficiency of the facts alleged therein to support the charge.

Only in case of **want of jurisdiction to proceed,** would a Federal court be authorized to take cognizance by *habeas corpus*, and then only if some right or immunity of petitioner (secured by Federal law) was infringed. There is **no such showing.**

We respectfully submit that under the decisions of this Court there is no substantial ground on which to invoke its jurisdiction, and that the petition for *habeas corpus* does not even present a case of Federal cognizance in any forum of that authority.

Drury v. Lewis, 200 U. S. 1
Empire Co. v. Hanley, 205 U. S. 233

II

If jurisdiction here exists, there is still no merit in this appeal.

Where the local court in question has jurisdiction of the subject-matter of the charge, mere insufficiency in the indictment in alleging facts to support the **charge** does not warrant a discharge on *habeas corpus*.

Whether facts charged in an indictment constitute a crime under the State statutes, the courts of the State should decide. It is their province to determine that question if they have jurisdiction of the subject-matter.

In re Belt, 159 U. S. 95
Hyde v. Shine, 199 U. S. 62
Riggins v. U. S., 199 U. S. 547
Rogers v. Peck, 199 U. S. 425
Ex parte Moran, 144 Fed. 594

The use of *habeas corpus* (as sought in this case) is **a collateral attack** on the pending proceeding in the court of Texas, and is only maintainable if that court has **no power** to proceed at all.

Ex parte Watkins, 3 Pet. 203
U. S. v. Pridgeon, 153 U. S. 59
In re Kowalsky, 73 Calif. 120

The leading question on this branch of the case is whether the Texas court has **jurisdiction of the offense** alleged or of the **charge**, whatever may be said as to the sufficiency of the indictment.

If the facts are alleged in such way in the indictment as NOT to render the judgment of conviction thereon **void** on a collateral attack, then there is no ground to discharge on *habeas corpus*—for that only is available where the prisoner is held **without jurisdiction.**

Benson v. Henkel, 198 U. S. 10
Felts v. Murphy, 201 U. S. 123
Pierce v. Texas, 155 U. S. 311
Urquart v. Brown (1907), 27 Sup. Ct. Rep. 459
Hyde v. Shine, 199 U. S. 62
Carfer v. Caldwell, 200 U. S. 293
In re Lancaster, 137 U. S. 393

The writ of *habeas corpus* is **susceptible of great abuse** if any sanction is given to its use as a revisory writ. It was never designed, and should not be tolerated to serve the purpose of a writ of error, except where the error consists in **want of jurisdiction** of the subject-matter of the **charge.**

A charge may be made in many ways—by affidavit only, in some matters, by information in other cases; by a coroner's inquest, as well as by indictment, depend-

ing on the existing law of the day and of the place where the charge is made.

A failure to state a cause of action does not defeat jurisdiction if enough is said to disclose that a lawful jurisdiction is invoked.

17 Ency. Law (2nd Ed.) 1069

Here the **charge is false swearing,** defined clearly as a crime by the Texas law. If the facts in the indictment are not sufficient as alleged, the procedure of Texas sanctions a new indictment on the same **charge,** or on a different charge. The extradition is asked on the pending **charge,** over which the Court where the indictment (containing the charge) is on file, has jurisdiction.

The act of petitioner in filing the affidavit on which the **charge** of false swearing is founded, was done in Travis County, Texas; which act subjected petitioner to the jurisdiction of the laws of Texas and of the very locality where the grand jury returned the indictment. Is not the law of Texas to be permitted to apply to those facts? And until that law has adjudged **something,** how can petitioner be wronged in respect of any right secured or protected by Federal law, statutory or organic? The **very claims he here** makes may be **sustained** when presented to the proper tribunals in Texas with the learning, ability and force which his counsel command. Why, then, should this Court intervene with a **writ of error** *de bene esse*, in the disguise and in the name of *habeas corpus*, and stamp the Travis County indictment with the seal of worthlessness? This Court is sitting at a distance of hundreds of miles from the local government whose **charge** has been formally made against petitioner.

The people of the State of Texas, in their sovereign capacity, have set a **charge** against petitioner, for an **act done in their domain.** Those people have the right to administer their own laws, in their own way, through the procedure they have ordained, so long as they do not infringe or invade any right or immunity secured to petitioner by Federal law.

Is it to be assumed, in advance of the fact, or of any invocation of Texas law, that any just right or immunity of petitioner will be ignored or disregarded? This is what petitioner's attitude in this *habeas corpus* proceeding assumes, and without legal ground therefor, as we respectfully submit. The attempt to use this process as a prohibitory writ or a revisory writ, in advance of any ruling on the **charge** in Texas, we deem an unwarranted invasion of the **right of the people of Texas to administer their own laws,** so long as they infringe not any Federal right, privilege or immunity of the petitioner. We deem the attempt, moreover, distinctly contrary to precepts established by many decisions and to sound principles of procedure in the Federal jurisdiction.

Am. Sugar Co. v. New Orleans, 181 U. S. 281
Markuson v. Boucher, 175 U. S. 184
Baker v. Grice, 169 U. S. 284
State v. Gray, 37 N. J. L. 368

III

As to the Statute of Limitations

A conviction on indictment showing on its face that the crime was barred by limitation is NOT void on collateral attack.

Johnson v. U. S., 3 McLean 89; 13 Fed. Cas. (7418)
In re Davidson, 21 Fed. 618

Where the bar of limitation is embodied in the statute itself, or a right conferred by statute is subject to a limitation as to time, it is necessary for an affirmative showing to be made that the right in question is asserted within the limited time.

Barker v. Railroad, 91 Mo. 86

But where the ordinary bar of limitation (which is subject to exceptions or avoidance arising from absence from the State or other causes) is invoked, that defense relates to the merits only and not to the right or cause of action, and hence it is a defense which must be affirmatively shown by evidence, even if the general plea of not guilty will permit such a defense to be raised, as in Missouri, for instance.

State v. Snyder, 182 Mo. 498

The Federal law is as positive as the State law of most of the States of the Union in declaring that the statute of limitations is a defense relating to the merits; and does not affect the jurisdiction of the Court in any particular, even if it should appear on the face of the pleadings that the limitation was a bar, if invoked by by the defendant.

U. S. v. Cook, 17 Wall. 168
In re Davidson, 21 Fed. 618
Ex parte Townsend, 133 Fed. 74

The statute of limitations only affects the remedy; it does not destroy the right of action and is good as a bar only when invoked in some way.

Campbell v. Haverhill, 155 U. S. 618

In a case decided by Mr. JUSTICE FIELD and JUDGE SAWYER in the Pacific Circuit, where the facts which would give force to the Statute of Limitations were ADMITTED in the *habeas corpus* proceedings, the federal court, nevertheless, held that such defense WAS NOT AVAILABLE to discharge a prisoner on *habeas corpus*, saying:

> "In this case the petitioner alleges as a ground of the illegality of the imprisonment that the offense charged was committed more than two years before the arrest and order for a court martial. This is one of the issues tendered. It is not admitted in the return, but is in the statement of facts. This admission is only a substitute for evidence on the hearing. But this is not the Court to try that issue. The court martial is the tribunal invested with that jurisdiction. Should this case be tried before a court martial duly organized, and decided against the petitioner, this court would have no appellate jurisdiction—no reviewing power—by *habeas corpus* or otherwise, over its decision. Nor are we authorized to interfere in advance, anticipating that the point may be wrongly decided, and take the case away from the Court having jurisdiction to try it, and determine it ourselves. This would be, in our judgment, a plain usurpation of a jurisdiction committed to another tribunal—a jurisdiction not conferred upon this Court. We can only inquire whether the military authorities are proceeding **regularly within their jurisdiction.** If they are, we cannot interfere, no matter what errors may be committed in the exercise of its lawful jurisdiction."
>
> *In re* White, 17 Fed. 725
> See also 133 Fed. 74, Ex parte Townsend

In view of these authorities and others easily accessible to the Court, it seems needless to argue that any lapse of time appearing on the face of the indictment

between the act charged as a crime and the finding of the indictment would not deprive the trial court of **jurisdiction** to examine into the facts alleged.

IV

The Texas Law of Limitations

The saving clauses of the limitation laws of Texas, applicable to absentees and fugitives would **prevent any conclusive bar** of an indictment arising from lapse of time (Texas Code Crim. Proc. Art. 221, similar to R. S., U. S., sec. 1045), but beyond that, it is the better opinion, fortified by the authority of this Court, that **an indictment need not negative** facts which, on their face, might indicate that the charge was barred by limitation. That bar is an **affirmative** defense and cannot be considered in advance of a plea invoking it, in circumstances such as here appear by the pleading.

U. S. v. Cook, 17 Wall. 168
Shelp v. U. S., 81 Fed. 694
Blackman v. Com., 124 Pa. 578
People v. Durrin, 2 N. Y. Crim. Rep. 328
People v. Van Santvoord, 9 Cow. 655
Thompson v. State, 54 Miss. 740
Gill v. State, 38 Ark. 524
State v. Hussey, 7 Iowa 409

The comments of Judge ADAMS, in his learned opinion on this phase of the case, are a demonstration of the correctness of his ruling thereon, and leave little to add.

Under the Texas Code the date proved under an indictment for perjury need not be the exact one alleged. It may be another date within the statute of limitations.

Lucas v. State, 11 S. W. Rep. 443
Temple v. State, 15 Tex. Ap. 304

In regard to the charge of false swearing, made in the indictment before the Court, it ought to be mentioned that even the most casual reading of the Texas law in regard to Pools, Trusts, etc., will disclose that such an affidavit, as is said to have been made by the petitioner in Texas, is only required by law AFTER the foreign corporation has obtained a permit to do business. So that the affidavit in question (having been made before the foreign corporation in question obtained a permit) was not "required by law" and therefore, if the statements were in other respects false, the offense would be **false swearing** and not perjury.

We mention this merely to show that the indictment is undoubtedly valid and sufficient under the Texas law, although we do not wish to be drawn into a discussion of that question to any considerable extent. We deem it wholly immaterial at this time. But, even if we were wrong in the above view of the indictment, the Texas statute (already cited), indicating that perjury and false swearing are only different degrees of the same general offense, would be applicable. (Crim. Proced., Art. 752, sec. 7). The proper indictment might be found which would meet the facts developed by the first trial. Code, Crim. Proced., Art. 829

It is scarcely necessary to repeat that if petitioner is extradited on one charge he may be tried upon another, without violence to any constitutional or other right.

LasCalles v. Georgia, 148 U. S. 537
State v. Glover, 112 N. C. 896 (17 S. E. 525)
People v. Cross, 135 N. Y. 536 (32 N. E. 246)
Com. v. Wright, 158 Mass. 149 (33 N. E. 82)
State v. Walker, 119 Mo. 467

State v. Kealy, 89 Iowa 94 (56 N. W. 283)
Carr v. State, 104 Ala. 4 (16 So. 150)
State v. Stewart, 60 Wis. 587 (19 N. W. 429)
Williams v. Weber, 1 Colo. Ap. 191 (28 Pac. 21)
In re Petry, 47 Neb. 126 (66 N. W. 308)
Taylor v. Com. (Ky.) 96 S. W. 440

This statement is not intended, however, to foreshadow any such purpose; but merely to show how little the precise facts alleged have to do with the right to extradite a prisoner, provided enough appears to show that a charge is made over which the Texas Court had jurisdiction.

Even if the indictment (on account of limitation) was bad on demurrer or motion in arrest, there would be jurisdiction which would save the judgment from being void collaterally, and that is enough to bar discharge of defendant on *habeas corpus*.

U. S. v. Cook, 17 Wall. 168
People v. Santvoord, 9 Cow. 655.

If the bar of limitation of the **Texas law** be invoked by petitioner, it will be time enough **then** for the courts of that State to determine how far it is applicable. It may possibly never be pleaded and, if pleaded, may be avoided by counter-plea of **absence** of petitioner from the State.

The Texas law allows avoidance of the defense of limitation (and indeed THERE IS NO LIMITATION by the very terms of the law) during the time when the accused is "absent from the State" (Code of Crim. Proced., Art. 221). As petitioner is absent now the statute is not running, and how long it has been running does not appear. How then can it be said that the bar of limitation ap-

pears on the papers; even if it did, it would not affect the jurisdiction of the cause or vitiate a judgment on such papers.

U. S. v. Cook, 17 Wall. 168
In re Davidson, 21 Fed. 618
In re White, 17 Fed. 725

Jurisdiction of the subject-matter of the **charge** exists in the Texas Court and the indictment avers facts enough to show that the jurisdiction has been invoked in a regular way, approved by the Governors of Texas and of Missouri.

Foltz v. R. R., 60 Fed. 316

A failure to avoid (by facts) the defense of limitation does not affect the jurisdiction over the cause in any way. It is at worst error, and does not affect the jurisdiction.

Revelle v. R. R., 74 Mo. 438
17 A. & E. Ency. L. (2nd) 1069
State v. Gill, 33 Ark. 129
Thompson v. State, 54 Miss. 740
People v. Van Vantvoord, 9 Cow. 655
State v. Bowling, 10 Humph. 52

Conclusion

We do not desire to enlarge unnecessarily this discussion or to multiply authorities on propositions which we consider well-grounded in elemental principles of procedure. Our contention has been that there is no **real or substantial federal question** raised in the petition for *habeas corpus*, and still less any question of con-

struction or application of the **Constitution or laws of the United States.** The points of objection to the process of extradition all depend upon the **construction and application** of the laws of Texas.

The courts of that State, we submit with utmost respect, are entirely capable of dealing with those questions in the first instance. If in so doing, any Federal right of petitioner be invaded or infringed, he may, by appropriate steps, secure full protection of such right, even to the extent of a writ of error from this Court in event of rulings thereon, adverse below.

We claim that the writ of *habeas corpus* is not available to discharge one "**charged** with crime", where the procedure or process attacked thereby is within the **jurisdiction of the Court** of that process or procedure; and that no sufficient ground has been shown for the long check which has interrupted the regular course of procedure of the Court of Texas which has jurisdiction of the original **charge** against petitioner. We insist most respectfully and earnestly that the Texas Court in which the indictment was found has jurisdiction of the **charge** against petitioner, and that he should be required to respond to that **charge.**

"**Full faith and credit**" should be given to the "**judicial proceedings**" of the State of Texas by the federal, no less than by all other State authority. The people of Texas and her courts will accord to petitioner every just right, whether of federal or other origin; and to discharge petitioner, at this time, by this **collateral attack** upon the Texas proceedings, without any expression of the voice of law from her courts, would be to exercise a jurisdiction properly belonging to Texas, and not to any federal jurisdiction.

We respectfully submit that the decision of Judge ADAMS, remanding the petitioner, was correct, and that it should be affirmed.

F. J. MCCORD,
Assistant Attorney General of Texas,

Thos. T. Fauntleroy

Shepard Barclay

Counsel for Appellee and for
The State of Texas

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1907

No. 357

HENRY CLAY PIERCE, APPELLANT,

vs

E. P. CREECY, CHIEF OF POLICE

ADDITIONAL BRIEF FOR APPELLEE

F. J. McCORD,
Assistant Attorney General of Texas
THOMAS T. FAUNTLEROY,
SHEPARD BARCLAY,
Counsel for Appellee and for
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ADDITIONAL BRIEF FOR APPELLEE

Owing to the short period available to counsel to prepare briefs for the hearing of this cause, at the date to which it was advanced for argument, it developed, during the oral discussion at that time, that some further materials might with advantage be submitted, in aid of your Honors' investigation of questions involved in the appeal.

Appellee therefore asked the leave, which was granted, to file this additional brief, hoping to supply some omitted features of the statute law mentioned at the argument, and to offer a few suggestions to some points raised in the learned adversary argument not fully treated in our former brief.

We deem the case one of CONSIDERABLE IMPORTANCE, chiefly because of the limitless reach of the writ of *habeas corpus* which is assumed in the appeal and in the argument of our learned adversaries; for if the writ be sanctioned in this court as a means to review and determine the SUFFICIENCY of the allegations in the indictment in question, TESTED BY THE LAWS OF TEXAS, then our distinguished and

learned friends on the other side may truly claim the discovery and conquest of a new domain in the realms of American procedure.

We contest their claim at the outset, and respectfully insist that both precedent and principle preclude the use of *habeas corpus* to reach the results aimed at by the pending appeal and by the petition below.

I.

The Issue of Federal Jurisdiction

It is claimed in the learned brief for appellant (p. 12) that

> "the petition for the writ distinctly alleged, as the basis of the petitioner's right, that the detention of the appellant was in violation of the Constitution of the United States, in that the indictment upon which the extradition proceedings were based did not constitute a 'charge of crime' within the meaning of Article 4, Section 2, Subdivision 2 of the Constitution (Record, pp. 2-6-7), and therefore did not justify the arrest."

We have read attentively the petition for the writ in this record, and have been unable to find where any such claim is "DISTINCTLY ALLEGED." As we read the claim of petitioner, it is that he is restrained of his liberty, "in violation of the laws and Constitution of the United States." This GENERAL language is later reduced to PARTICULARS which announce "that said restraint, imprisonment, detention and confinement are ILLEGAL, and that the ILLEGALITY thereof consists in this, to-wit:"

Then follow FIVE specifications, each of which calls for the construction and application of the LAWS OF TEXAS, and *none* of which calls for the construction or application of any law of the United States. Their substance is given in our first brief (p. 5) and their exact terms appear in the Record (pp. 6-7).

The *Habeas Corpus Act* of the United States (R. S., U. S., secs. 751, etc.) sanctions resort to that writ where a person is in custody "under or by color of the authority of the United States," OR where he is in custody in violation of the Constitution or of a law or treaty of the United States. The latter might possibly be claimed as the ground on which federal jurisdiction is invoked in this case, barring the effect of THAT SPECIFICATION OF DETAILS OF ILLEGALITY, which annuls the *general terms* of introduction thereto, according to elemental rules of interpretation of such writings.

But there is a singular and total want of any averment in the petition suggesting a claim that petitioner is in custody "under or by color of the authority of the United States."

Although the requisition by Governor CAMPBELL of Texas for surrender of the petitioner is by the Governor recited to be "in pursuance of the provisions of the Constitution and laws of the United States," the warrant of arrest, issued by Governor FOLK of Missouri, says nothing on that subject, and the petition for *habeas corpus* has no greater range of allegation than has been already shown.

On this record, we insist, very respectfully, that the petitioner is lawfully subject to arrest, detention and extradition, under the STATUTE LAWS of Missouri and of Texas, each of which States provides a method of interstate extradition, in harmony with the federal Constitution and laws, yet broader in scope, affording additional facilities and securities to those afforded by the federal law for the apprehension and surrender of fugitives from justice in either State. These local laws of extradition we deem to be valid and constitutional enactments. Although there may be *dicta* in some federal opinions intimating that extradition between the States of our Union is governed exclusively by the federal enactments (for instance, *Ex parte* Morgan, 20 Fed. 301, by the late Judge PARKER) there is much cogent authority to the effect that the States have constitutional power and right (among those reserved to the States and to the people thereof) to

legislate to promote and enforce, by their own laws, the extradition of persons charged with crime who seek asylum in those States.

The Texas law of extradition is found in the Code of Criminal Procedure, beginning with Article 1051, which is almost literally a copy (*mutatis mutandis*) of the section of the federal Constitution on that subject.

Then by the next section (1052)

> "it is declared the duty of all judicial and peace officers of the State to give aid in the arrest and detention of a fugitive from any other State or Territory that he may be held subject to a requisition by the Governor of the State or Territory from which he may have escaped."

Article 1053 provides that when a complaint on oath is made to a magistrate that any person in his jurisdiction is a fugitive from justice, it is his duty to issue a warrant for the apprehension of such person.

The next article has a decided bearing upon the question as to the FORM OF CHARGE essential to extradition according to the Texas statutory law. It provides (Article 1054) in substance that the sworn complaint shall be sufficient to warrant the arrest and detention of a fugitive from justice, if it recite:

1. The name of the person accused.
2. The name of the State or Territory whence he has fled.
3. The offense committed by the accused.
4. That he has fled into this State.
5. That the act alleged is a violation of the penal law of the State or Territory from which he fled.

Later sections of the Texas law (Arts. 1055-1059) provide for a warrant of arrest; for the commitment or bail of the accused, and his detention for 90 days in anticipation of presentation of the authenticated formal charge as made in the other State; and for notice of the proceedings by the magistrate to the Secretary of State.

In Missouri, like local laws obtain (R. S., Mo., 1899, secs. 7466-7484) whereby such a fugitive may be apprehended *in advance of any process ordained by federal law*, upon sworn complaint, and steps similar to those described by the Texas law.

This Missouri statute has been long in force. It provides for the arrest of any one charged with crime, committed in another state, where affidavit is duly made of that fact. The terms of that law should be before your Honors, so we print the chapter on that subject, as follows:

Chapter 108.

FUGITIVES FROM JUSTICE.

Sec. 7466. *Governor to issue warrant, when.*—Whenever the executive of any other state shall demand of the executive of this state any person as a fugitive from justice, and shall have complied with the requisites of the act of congress in that case made and provided, it shall be the duty of the executive of this state to issue his warrant, under the seal of the state, directed to any sheriff, coroner, or other person whom he may think fit to entrust with the execution of such warant. (R. S. 1889, § 5190.)

Sec. 7467. *Warrant to give what authority.*—The warrant shall authorize the officer or person to whom it is directed to arrest the fugitive anywhere within the limits of this state, and convey him to any place therein named, and shall command all sheriffs, coroners, constables and other officers to whom the warrant may be shown, to aid and assist in the execution thereof. (R. S. 1889, Sec. 5191.)

Sec. 7468. *Where and how executed.*—Every warrant so issued may be executed in any part of the state, and the officer or person to whom it is directed shall have the same power to command assistance therein, and in receiving and conveying to the proper place any person duly arrested by virtue thereof, as sheriffs and other officers, by law, have in the execution of civil or criminal process directed to them, with

like penalties on those who refuse their assistance. (R. S. 1889, sec. 5192.)

SEC. 7469. *Power and duty of officer arresting.*—The officer or person executing such warrant may, when necessary, confine the prisoner arrested by him in the jail of any county through which he may pass, in conveying such prisoner to the place commanded in the warrant; and the keeper of such jail shall receive and safely keep such prisoner until the person having him in charge shall be ready to proceed on his route. (R. S. 1889, sec. 5193.)

SEC. 7470. *Expenses, how paid.*—The expenses which may accrue under the foregoing sections of this chapter shall be paid by the state or territory making the demand of such fugitive from justice. (R. S. 1889, Sec. 5194.)

SEC. 7471. *Judge or justice may issue warrant, when.*—Whenever any person within this state shall be charged, on the oath or affirmation of any credible witness, before any judge or justice of a court of record, or a justice of the peace, with the commission of any crime in any other state or territory of the United States, and that he fled from justice, it shall be lawful for the judge or justice to issue his warrant for the apprehension of the party charged. (R. S. 1889, Sec. 5195—*a*.)

SEC. 7472. *On Examination, party may be committed.*—If, upon examination, it shall appear to the judge or justice that the person charged is guilty of the crime alleged, he shall commit him to the jail of the county, or, if the offense is bailable, take bail for his appearance at the next term of the court of the county having criminal jurisdiction. (R. S. 1889, Sec. 5196.)

SEC. 7473. *Proceedings on examination.*—The judge or justice shall proceed in the examination in the same manner as is required when a person is brought before such officer, charged with an offense against the laws of this state, and shall reduce the examination to writing, and make return thereof as in other cases, and shall also send a copy of the examination and proceedings to the governor of this state without delay. (R. S. 1889, Sec. 5197.)

SEC. 7474. *Duty of the governor.*—If, in the opinion of the governor, the examination contains sufficient evidence to warrant the finding of an indictment, he shall forthwith notify the executive of the state or territory in which the crime is alleged to have been committed of the proceedings against the person arrested, and that he will be delivered on demand, WITHOUT REQUIRING A COPY OF AN INDICTMENT TO ACCOMPANY THE DEMAND. (R. S. 1889, Sec. 5198.)

SEC. 7475. *Offender to be delivered upon demand.*—When a demand shall be made for the offender, the governor shall forthwith issue his warrant, under the seal of the state, to the sheriff of the county wherein the party charged is committed or bailed, commanding him to surrender the accused to such messenger as shall be therein named, to be conveyed out of the state. (R. S. 1889, Sec. 5199*b*.)

SEC. 7476. *If at large on bail, sheriff authorized to take him.*—If the accused shall be at large on bail or otherwise, it shall be lawful for the sheriff to arrest him forthwith, anywhere within the state, and to surrender him agreeably to the command of the warrant. (R. S. 1889, Sec. 5200.)

SEC. 7477. *Circuit court may discharge.*—In all cases where the party shall have been admitted to bail, and shall appear, according to the condition of his recognizance, and he shall not have been demanded, the court may discharge the recognizance or continue it, according to the circumstances of the case—such as distance of the place where the offense is alleged to have been committed, the time since the arrest, the nature of the evidence, and the like. (R. S. 1889, Sec. 5201.)

SEC. 7478. *Not to be kept in prison.*—In no case shall the party be kept in prison or held to bail beyond the end of the second term of the court after the arrest; and if no demand is made for him within that time, he shall be discharged. (R. S. 1889, Sec. 5202.)

SEC. 7479. *Recognizance to inure to state.*—When any such recognizance shall be forfeited, it shall inure to the benefit of the state. (R. S. 1889, Sec. 5203.)

SEC. 7480. *Security for costs.*—When a complaint shall be made against any person, as provided by this chapter, the judge or justice shall take from the prosecutor a bond, to the clerk of the court, with sufficient security, to secure the payment of the costs and expenses which may accrue by occasion of the arrest and detention of the party charged, which bond shall be certified and returned, with the examination, to the office of the clerk of the court having criminal jurisdiction. (R. S. 1889, Sec. 5204.)

SEC. 7481. *Costs, how collected.*—Upon the determination of the proceedings in that court, the clerk may issue fee-bills, which shall be served on the principal and sureties in the bond, by the sheriff, in the same manner as other fee-bills, for which service the sheriff shall be allowed the same fees as for serving notices. (R. S. 1889, Sec. 5205.)

SEC. 7482. *If not paid, execution to issue, when.*—If the costs and charges are not paid on or before the first day of the next term of the court, nor any cause shown why they should not be paid, the clerk may issue execution for the same against the parties on whom the fee-bills were served. (R. S. 1889, Sec. 5206.)

SEC. 7483. *Preceding sections construed.*—Nothing in the two preceding sections shall be construed to prevent the clerk from instituting suit on such bond for the recovery of the costs and charges. (R. S. 1889, Sec. 5207.)

SEC. 7484. *Bail may be taken.*—Whenever any person shall have been committed to the jail of the county, upon examination, for a bailable offense, under the provisions of this chapter, he may be let to bail, with sufficient security for his appearance at the next term of the court of the county having criminal jurisdiction, by the court or judge of the court having criminal jurisdiction, or by any judge or justice of the county court. (R. S. 1889, §5208.)

(The display type is ours.)

R. S., Mo., 1899, secs. 7466-7484.

Under section 7471 above quoted (R. S. 1899) formerly section 5105 of R. S. 1889, and, earlier, section 5706 of R. S., 1879, it has been *held* that the sworn charge should either DIRECTLY AVER that the party was charged with the commission of a crime in another state, *or* aver the *facts* which show that acts alleged were a crime under the laws of the other state, or were a crime at common law.

State *v.* Swope, 72 Mo. 399.

The charge in the case at bar is fully sufficient *under the Missouri law* to sustain the warrant of arrest issued by Governor FOLK for, under that law, NO INDICTMENT is necessary to authorize the arrest of the accused.

Mo., R. S. 1899, sec. 7474.

We trust your Honors will see your way clear to consider and determine whether or not state laws of extradition may not justify the detention of persons (regularly charged with crime in other states) by virtue of those laws, and their own inherent force, so far as they *do not conflict* with the federal laws of that subject. We claim that such laws, and in this instance the Missouri law on that topic is valid, and that it justifies the arrest in this case, without reference to the federal statutes. In other words, we assert that the petitioner is validly held under the state law and that the federal law is not exclusive.

Com. *v.* Tracy, 5 Met. 536.
Ex parte Ammons, 34 Ohio St. 518.
Com. *v.* Wilson, 1 Phila. 80.
State *v.* Anderson, 1 Hill, Law (S. C.) 348.
Matter of Fetter, 23 N. J. L. 315.
State *v.* Hall, 115 N. C. 818.
Holmes *v.* Jennison, 14 Pet. 597.

Our contention for recognition of state jurisdiction in extradition is of far more importance than it seems at first glance, since this court has held that the duty imposed on the state executive by federal law is a duty of *imperfect*

obligation; that it imposes a mere moral command, one which may not be enforced by *mandamus*.

Kentucky *v.* Dennison, 24 How. 109.

It is likewise a general precept of the federal system of law that the states may properly legislate on subjects of *concurrent* jurisdiction, so long as they do not come in conflict with federal law, organic or statutory.

Reid *v.* Colorado, 187 U. S. 147.

If the states may validly legislate on the subject, duties may be imposed in such a way as to increase and strengthen the force and power of the *obligation* to act in the matter of extradition, so that the duty to take necessary steps therefore may become ministerial and enforceable by *mandamus* (even against the state executive) although not so, under the federal law.

We earnestly insist that not only is the detention of petitioner valid under the Missouri law, but that the petition for *habeas corpus* raises no real or substantial federal question, but only questions requiring interpretation and construction of the laws of Texas.

The petition for the writ here does not claim that petitioner is in custody "under or by color of the authority of the United States" (R. S., U. S., sec. 751). It only asserts that he is detained "in VIOLATION of the laws and Constitution of the United States" (Record, p. 2) and the specifications of that *general claim* assert merely supposed INSUFFICIENCY in the facts recited in the indictment, *tested by* THE LAWS OF TEXAS (Record, pp. 6-7). The purpose of the *habeas corpus* writ appears to be to have this Court pass on the sufficiency of the facts recited in the Texas indictment, as if, on writ of *certiorari* to the Texas court, the Texas record had been sent here for review on matters of Texas law in advance of any Texas judicial rulings whatsoever. In this aspect of the record, we respectfully insist that there is no federal question raised or any issue for the construction or application of the Constitution of the United

States, within the meaning given to that jurisdictional language by recent learned opinions of this Court.

Empire Co. *v.* Hanley, 205 U. S. 233.

Drury *v.* Lewis, 200 U. S. 1.

Carfer *v.* Caldwell, 200 U. S. 292.

II.

The appellant has been duly "charged with crime" within the meaning and intent of the Texas law and of the federal law.

To give your Honors a full view of the Texas substantive law in regard to *perjury* and *false swearing* (the latter being the charge against appellant) we reproduce here some sections of the Texas Penal Code:

CH. 1.—OF PERJURY

ART. 201—(188). "PERJURY" DEFINED—Perjury is a false statement, either written or verbal, deliberately and willfully made, relating to something past or present, under the sanction of an oath or such affirmation as is by law equivalent to an oath, where such oath or affirmation is legally administered, under circumstances in which an oath or affirmation is required by law, or is necessary for the prosecution or defense of any private right, or for the ends of public justice.

ART. 202—(189). NOT PERJURY, WHEN—A false statement made through inadvertence, or under agitation, or by mistake, is not perjury.

ART. 203—(190). OATH MUST BE LEGALLY ADMINISTERED.—The oath or affirmation must be administered in the manner required by law, and by some person duly authorized to administer the same in the matter or cause in which such oath or affirmation is taken.

ART. 204—(191). AND ABOUT SOMETHING PAST OR PRESENT.—The false statement must be of something

past or present—oaths of office or any other promissory oaths, are, therefore, not included in the definition of perjury, except that part of the official oath prescribed by the constitution which relates to dueling.

ART. 205—(192). IN WHAT SORT OF PROCEEDING.—All oaths or affirmations legally taken in any stage of a judicial proceeding, civil or criminal, in or out of court, or before a grand jury, are included in the description of the offense.

ART. 206—(193). IMMATERIAL STATEMENT NOT PERJURY.—The statement of any circumstances wholly immaterial to the matter in respect to which the declaration is made is not perjury.

ART. 207—(194) PUNISHMENT.—(As amended by Gen. Laws, Texas, regular session, 1897, p. 146, ch. 107)—"The crime of perjury, except in cases provided for in Article 208 of the Penal Code, shall be punished by imprisonment in the penitentiary for a term, not more than ten years, nor less than two years."

(Took effect in the year 1897.)

ART. 208—(195). PERJURY IN CAPITAL CASE.—When the perjury is committed on a trial of a capital felony, and the person guilty of such perjury has, on the trial of such felony, sworn falsely to a material fact tending to produce conviction, and the person so accused of the capital felony is convicted and suffers the penalty of death, the punishment of the perjury so committed shall be death."

CH. 2.—OF FALSE SWEARING

ART. 209—(196) "FALSE SWEARING," DEFINITION OF—If any person shall deliberately and willfully, under oath or affirmation legally administered, make a false statement by a voluntary declaration or affidavit, which is not required by law, or made in the course of a judicial proceeding, he is guilty of "false swearing," and shall be punished by imprisonment in the penitentiary not less than two nor more than five years.

ART. 210—(197). PAST OR PRESENT. The false

swearing must, as in regard to perjury, be relative to something past or present.

ART. 211—(198). OFFICER FALSELY REPORTING COLLECTIONS OF PUBLIC MONEYS.—If any officer of this state, or of any district or county thereof, who is charged by law with the duty of receiving or collecting public money, other than taxes, for the use of the state or counties and reporting the same, under oath, to the district, county or commissioners' court of any county, shall falsely report the amount of such collections, or any part thereof, he shall be deemed guilty of false swearing, and upon conviction, shall be punished as prescribed in Article 209.

ART. 212—(198*a*) in substance, defines as false swearing, like statements "about any matter concerning which the quarantine laws and regulations permit examination."

In regard to the form and nature of a *charge* of false swearing, within the import of these Texas statutes, some other features of the Codes should be considered:

ART. 438—(419). AN "INDICTMENT" IS WHAT.—An indictment is the written statement of a grand jury, accusing a person therein named of some act or omission, which, by law, is declared to be an offense."

Willson's Tex. Crim. Stats. (4 ed., 1896) p. 129 (Crim. Proced.).

* * * * * * *

ART. 26—(26). "CRIMINAL ACTION" DEFINED.—A "criminal action" as used in this Code, means the whole, and any part of the procedure which the law provides for bringing offenders to justice; and the terms "prosecution," "a criminal prosecution," "accusation," and "criminal accusation," are used in the same sense."

Willson's Tex. Crim. Stats. (4th ed., 1896) Penal Code, Art. 26, pp. 26-7.

We quote here a section of the Texas law of procedure (Code, Crim. Proced.) in regard to the effect of charges, *insufficiently presented*, but based on competent facts:

> "ART. 829—(789). EFFECT OF ARRESTING A JUDGMENT.—The effect of arresting a judgment is to place the defendant in the same position he was before the indictment or information was presented; and if the court be satisfied from the evidence that he may be convicted upon a proper indictment or information, he shall be remanded into custody, or bailed, as the case may require."

Full effect to this statute in Texas has been given.
Calvin *v.* Texas, 25 Tex. 789.

Having these local laws in mind, let us ask whether the accusation of false swearing in this indictment is a sufficient "*charge of crime*," within the intent of the federal laws.

It has been decided, in a recent unanimous opinion of this Court, that, under the federal legislation for extradition, a *mere affidavit* of the CHARGE (in that case, *obtaining* certain jewelry "*by false pretenses*") before a committing magistrate of a distant state, *without any indictment*, was sufficient to satisfy the federal requirements, and to defeat an application for discharge upon *habeas corpus*.

In that decision it was said by Mr. Justice BREWER (referring to the terms of the constitution):

> "Doubtless the word 'charged' was used in its broad signification to cover any proceeding which a State might see fit to adopt by which a formal accusation was made against an alleged criminal. In the strictest sense of the term a party is charged with crime when an affidavit is filed, alleging the commission of the offense and a warrant is issued for his arrest, and this is true whether a final trial may or may not be had upon such charge" (p. 331).
> *Matter of* Strauss, 197 U. S. 324 (331).

The oaths of the Grand Jury of Travis County, Texas, charging appellant with false swearing, should certainly be ascribed, at least, the same force and effect as a mere affidavit of the "*charge*" before a committing magistrate, as in the *Strauss habeas corpus* proceeding.

In that case, the following recital appears by the certificate from the Court of Appeals:

> "The petitioner was charged by affidavit before a justice of the peace of Youngstown township, Ohio, with the crime of obtaining four hundred dollars' worth of jewelry at Youngstown, Ohio, by false pretenses, contrary to the laws of that State. He was arrested as a fugitive from justice and brought before a magistrate of the City of New York, August 11, 1902."
>
> [Certificate of U. S. Circuit Court of Appeals for the 2nd Circuit, to this Court, p. 1.]

On that recital, this court *held* that Mr. Strauss was lawfully detained, and restrained of his liberty.

We believe the same principles are applicable to the appellant here.

The ruling aforesaid is in accord with many decisions as to the import of a "*charge*" of crime.

Several such are cited in our first brief (pp. 7-8). We add

R. *v.* Cole (1813), 3 Campb. 371.

R. *v.* Hughes, 4 Q. B. D. 614.

In a late decision by the Court of Appeals in the Sixth Circuit, an escaped convict was held to be one "*charged* with crime" and that term was declared to include every person accused until acquitted or until judgment is satisfied.

Hughes *v.* Pflanz, 138 Fed. 980.

The prevailing spirit of interpretation of statutes for penal procedure in Texas is characterized by as much reasonable liberality and breadth as is consistent with due regard

for the constitutional and statutory rights of the accused to be fully informed of the nature and cause of the accusation against him.

In a well considered decision, holding that the word "*feloniously*" was not an indispensable part of the description of a charge of felony, the Texas Supreme Court *held:*

> "We think that the whole spirit of the codes authorizes the courts to dispense with what the books call '*terms of art*' in the description of offenses in indictments, and also in every part of the indictment, and that even so distinguished a word as 'feloniously' is no longer to be considered as a *sine qua non* in the administration of criminal justice in this State."
>
> (1860) Calvin *v.* State, 25 Tex. 789 (p. 793).

In that case, although the motion in arrest was overruled below, it was sustained on the appeal, and the court ordered the District Court to hold defendant committed until the Grand Jury had opportunity to present a new indictment. Under the Texas statutory rules of interpretation of such pleadings in criminal causes, a motion in arrest may be sustained only for defects *in substance*, in the allegations, not for any insufficiency in the form of statement thereof.

> Texas, Code Crim. Proced., arts. 462, 453, 826-9; 587-8.

It is furthermore the law of Texas that if an indictment upon one charge proves insufficient, the accused may be tried for another offense.

> *Ex parte* Fischl, 100 S. W. 773.

Just as this Court and other courts have held that, after interstate extradition, the accused may be tried for a *different crime* from that for which he was extradited, according to many decisions cited in our first brief (p. 18).

III.

The facts of the charge of crime, recited in the indictment, bring the charge properly within the jurisdiction of the laws of Texas concerning "false swearing."

We believe firmly that when it is conceded or shown that the crime is one defined by Texas laws, and that the accusation, made on oath, charges such a crime, the insufficiency of the facts alleged, "*when tested as on motion in arrest of judgment*" (to quote the learned brief on the other side, p. 13) would not justify the release (by a federal court) of a person charged with such crime under the laws of a state having such remedial and amendatory provisions as that quoted above from Texas, in regard to indictments adjudged insufficient *on motion in arrest*.

The distinction is between *want of jurisdiction*, which alone would warrant release by *habeas corpus*, and *insufficiency of allegations* where enough appears to show that the jurisdiction has been regularly and properly invoked and set in motion, though the facts to warrant the action sought may have been imperfectly recited.

We shall not repeat our argument and citations on this point, given in our first brief (pp. 11-13); but we wish to meet the adversary contention, presented with much learning and characteristic force, on the grounds so marked out for the discussion.

The affidavit was not required by law.

One of the contentions for appellant, which seemed to arouse some interest at the oral argument, was that of the petition for *habeas corpus* which asserted that the "affidavit being required by law, if false, could not be false swearing under the laws of the State of Texas" (Record, p. 15).

Here (as always in the appellant's specifications of

"illegality" of his detention) we must look to the Texas law to interpret its meaning.

The indictment avers, in the most positive manner, that the affidavit recited therein was "his voluntary false statement" (Record, p. 3) and that said false statement "was not then and there required by law nor made in the course of judicial proceedings" (Record, p. 6).

There are *three* answers to the contentions of appellant on this point:

a. The allegations of the indictment do not disclose the *circumstances* in which the affidavit was made. It may have been made voluntarily, without demand or request of anyone, and as such be a proper subject of a charge of false swearing. That is a pure and simple QUESTION OF FACT to be solved by the testimony when offered to support the averment of fact that the affidavit, as and when made, was *not* required by law.

b. The Act of Texas of 1899 in regard to Pools, Trusts, and Monopolies (Gen. Laws, 1899, p. 246) contained a section (the 8th) which required foreign corporations to submit to the Secretary of that State, on July 1st of each year, "and at such other times as he shall deem necessary," an affidavit in the statutory form (recited in full in that section) which was obviously followed and used in the affidavit recited in the indictment now before this Court.

By the laws of Texas, at the time, foreign corporations, as a condition to obtaining a franchise or permit to do business in the State, were required to file their articles of incorporation and obtain a license therefor (Civil Code, Texas, arts. 745-9) but they were not required by law to file any such affidavit as is recited in the indictment. If that affidavit was filed (as part of the proceedings for admission of the Waters-Pierce Company into Texas) it was strictly voluntary, and *not* required by law; but the opening lines of the affidavit indicate that it was filed *after* the company had been admitted to do business in Texas.

The 8th section of the aforesaid penal law of 1899, in re-

gard to "Pools" etc., purported to impose severe and drastic penalties on foreign corporations failing to file the affidavit as recited in that section after they were doing business in Texas.

This Court, however, in a leading case on the subject, held that such a requirement, as the 8th section of the Texas law aforesaid made, was unconstitutional and void, and its penalties *nugatory*.

Connolly *v.* Pipe Co., 184 U. S. 540.

In deference only to that ruling, the Texas courts held the 8th section of the Pools and Trust Act to be unconstitutional and void.

Texas *v.* Ice Co., 96 Tex. 461 (73 S. W. 951).

Texas *v.* Compress Co., 95 Tex. 603.

State *v.* Laredo Ice Co., 75 S. W. 1134.

The remainder of the Act of 1899 was sustained as a valid enactment, it being held (as elsewhere) that, if the void part was severable, the rest of the Act might be enforced.

Texas *v.* Ice Co., 96 Tex. 461.

Railway *v.* Mahaffy, 98 Tex. 392.

A similar penal section, in a like law of another state, has been excerpted from the rest of the statute, without invalidating the remainder thereof.

Frick *v.* Granite Co., 187 Mo. 244 (86 S. W. 213).

So the requirement of the section, under which the affidavit of appellant is claimed to have been made, being void and of no effect, the affidavit was "*not required by law*," in the sense of the law of the subject.

Where proceedings are *void*, for instance, perjury cannot be assigned thereon, and the same rule would prevail where an apparent statutory requirement for an affidavit is void.

Manning *v.* State, 81 S. W. 957 (46 Tex. Cr. Ap. 326).

This discussion is based on the assumption of fact contended for by learned counsel for appellant, without conceding that the indictment is susceptible of that interpreta-

tion. As we construe its language, the question whether the affidavit was, or was not, required by law should be determined in view of the facts and circumstances of the filing and making thereof, which facts must be known peculiarly by the affiant. They are not given in detail in the indictment, which charges the time, place, and form of the affidavit, and that it was *"not* then and there *required by law"* (Record, p. 6) making that issue one of FACT, to be solved upon the *evidence* adduced at the trial.

c. The exact meaning of the phrase *"required by law"* (as used in the Texas statute on *"false swearing"* applied to the Act of 1899 concerning "Pools, Trusts," etc.) is not sufficiently settled and definite to permit courts beyond the State to determine, without aid and interpretation by the courts of Texas on the particular facts involved, whether the affidavit in question was or was not "required by law."

It has been *held* that where the law requires "an instrument to be sworn to (before it can have a legal standing), by any person, then, if taken, it" (the oath) "would be under circumstances *required* by law."

Langford *v.* State, 9 Tex. Ct. Ap. 287.

But in a later decision, referring to an affidavit before a county clerk (authorized to administer oaths and to issue marriage licenses) stating that a certain girl was over 18 years of age, and that her parents had consented to her marriage, the court *held* that it was ground on which to base a charge of FALSE SWEARING but *not* of perjury. On this point the court said:

> "Our opinion is that it would not be a legitimate basis for an assignment of perjury under our statute, it being only a voluntary affidavit. Not being for use in any of the courts, such an affidavit would be extra-judicial, and an extra-judicial oath lays no foundation for a prosecution for perjury. (U. S. *v.* Babcock, 4 McLean 113; 2 Bish. Crim. Law, 7 ed. sec. 1027.)"

Davidson *v.* State, 22 Tex. Ct. App. 379-80

This decision was afterwards cited with approval.

Steber *v.* State, 23 Tex. Ct. App. 176

If the quotation last above is to be accepted literally, and an "extra-judicial oath lays no foundation for a prosecution for perjury," the affidavit in the case at bar would probably fall in the same class.

Much further strength might be given to that view, by observing the terms of articles 211 and 212 of the Texas Penal Code (as already quoted in this brief) wherein false official reports of certain officers are declared to furnish grounds for charges of "false swearing," though those reports are called for by other statutes.

Whether there is, furthermore, a distinction to be drawn (in defining the grounds of *false swearing*), between affidavits which *must be* (or are *"required"* to be) filed and those which *may be* filed, to secure some desired franchise or privilege (as, for instance, the continued right of a foreign corporation to do business in a state) we shall not discuss at any length, since it seems obvious to us that UNDER THE TEXAS LAW, that question is one which the state courts should first solve in any given case; and that the positive and clear allegation in the indictment to the effect that the affidavit in view *"was not then and there required by law"* (Record, p. 6) should be held sufficient in a *collateral attack* on the state proceedings, and sufficient allegation of FACT as a part of the charge of "false swearing." But, in passing, it may be noted that such a distinction (between what is *required* or demanded by law and what is merely authorized or permitted thereby) has been occasionally drawn, in no uncertain terms of expression, and much could be said to sustain that distinction here, if the 8th section of the "Pools and Trusts" Act of 1899 had been pronounced valid and constitutional instead of void.

Babcock *v.* Cobb, 11 Minn. 354

Mattingly *v.* Read, 60 Ky. 324

IV.

THE "CHARGE OF CRIME" IN THE INDICTMENT IS SUFFICIENT.

It is the contention of appellee that the charge of *false swearing*, contained in the indictment pending in the State court in Travis County, Texas, is a subject properly within the *jurisdiction* of that court under the laws of Texas; and that the question whether a *cause of action* is stated in the indictment, or whether the facts as therein alleged will repel a motion in arrest or general demurrer is FOREIGN to the proper scope of inquiry on this writ of *habeas corpus*. Nevertheless, we do not concede that the indictment is insufficient in any particular and we consider it good as against the points of criticism advanced in the learned brief for appellant.

> *a.* It is claimed by learned counsel that the statements in the affidavit in question are *"expressions of mere* OPINION, BELIEF *and* CONCLUSIONS, *upon which the crime of* false swearing *cannot be* PREDICATED."

Then follow (brief for appellant, pp. 29-30) some portions of the affidavit, but the entire affidavit should be read to gather the context of the passages quoted and reach the full significance of its statements.

Some of the following facts are stated in the affidavit:

> That the Waters-Pierce Oil Company *"is not now a member* of or a party to any pool, trust, agreement, combination, confederation or understanding with any other corporation" * * * " or any other person" * * * "to regulate or fix the price of *any article* of manufacture," etc.
>
> That said Company *"does not own* any trust certificates for any corporation" * * *
>
> That said Company "is not now in any combination, contract or agreement with any person or per-

sons, corporation or corporations" * * * "the purpose and effect of which" * * * "would be to place the management or control of such combination" * * * "or the manufactured product thereof, in the hands of trustees" * * * "with the intent to limit or fix the price, or lessen the production and sale of any article of commerce," etc.

That said company "is not now a monopoly" * * * "under the provisions of sections" (named) "of this Act," etc.

The falsifying allegations of the indictment (Record, pp. 5-6) declare that said Company, at the times recited, *was a "member of, and party to, a pool, trust, agreement,"* etc., giving particulars fully to show with whom the Waters-Pierce Oil Company was so associated; others of the aforesaid averments in the affidavit are negatived in the indictment in the most direct and positive manner (Record, pp. 5-6).

We construe the recitals in the affidavit as embodying many *facts;* and some of the unique and original ideas advanced at the argument and in the learned brief for appellant to give those facts the similitude of mere expressions of opinion or "conclusions of law," we regard, with all due respect, as fascinating and brilliant fallacies.

Instance the citation, relied upon to support those contentions, which is said to support the proposition that "where defendant swore that certain property *belonged to him,*" it has been held there was no perjury (*Anon.* Fed. Cas. No. 475)! But when the case is closely examined, it will be seen that in the opinion of Mr. Justice WASHINGTON he took direct issue with the assertion of counsel for defendant that the latter "might have sworn he was the owner of the brig without committing perjury."

Anon. 1 Fed. Cases, No. 475.

We interpret a statement that one is *not a member* of a pool, trust or combination as a statement of FACT, although, it may be, a *"composite* fact." Those who make oath to "composite facts" should be very sure that all parts of the

composition are well grounded. Even if some of the elements are comprised of *opinions or belief*, the latter must be held and verified *in good faith*, at least, or the affiant will be subject to such a charge as appears in this indictment, or to some higher charge of similar nature, according to the circumstances of the sworn statement.

> "It is a good assignment of perjury that a witness swore that he '*thought*' a certain writing was not his, whereas in truth and in fact he 'thought' it was his"—
>
> Regina *v.* Schlesinger, 10 Q. B. (Ad. & El., N. S.) 670

False testimony that one *believed* that a cause had been continued for the term when he *knew* the contrary, *was* held sufficient in nature for such a charge.

Crow *v.* State, 90 S. W. 650 (Texas)

In another Texas case, a similar charge was *held* maintainable upon a false statement that defendant did not "have in his possession or on his person any pistol."

Trevinio *v.* State, 88 S. W. 356

Some of the foregoing statements may have sounded, to ears attuned to such theories, like mere *conclusions of law*, or "composite facts," but the court deemed them sufficiently positive to form the basis of prosecutions as perjury or false swearing.

Where a man swore that he "never before claimed any damages from any railroad company," it was *held* good as the basis of a charge of perjury.

McDonough *v.* State, 84 S. W. 594 (Texas)

Sometimes the mere *belief* of a party may be the exact issue or FACT upon which a charge of perjury may be sustained.

State *v.* Cruikshank, 6 Blackf. 62

One of the most careful of textwriters on criminal law declares the rule as these decisions indicate.

2 Bishop, New Crim. Law (ed., 1892) sec. 1040

An indictment under statutes against "pools, trusts," etc.,

is not required to charge the means adopted or intended to carry out the purpose of such a combination.

State *v.* Witherspoon, 115 Tenn. 138 (90 S. W. 852)

The indictment is not deficient, we claim with all due respect, in any of the particulars which have been assigned as fatal blemishes therein. On the contrary, its CHARGE is clear, positive, and within the jurisdiction which the indictment invokes. Its averments are sufficient, under the laws of Texas (by which it must be interpreted) to require some plea thereto by the petitioner in accordance with the law of the locality where the acts so charged were done.

V.

The writ of habeas corpus is not properly applicable to discharge the petitioner from the charge which has not yet been heard in the State court, the latter having jurisdiction of the charge, and of the act of the accused (which forms the subject of the charge) done in the territorial jurisdiction of the court of the process.

We trust that our comments on some features of the learned argument submitted on behalf of appellant may not be misinterpreted to imply that we concede any relevant force in the attack upon the indictment for supposed insufficiency of its allegations. It contains a CHARGE of crime defined by the laws of Texas, and one within the *jurisdiction* of the court of the indictment.

Valentina *v.* Mercer, 201 U. S. 131

We submit respectfully, and without desiring to repeat the arguments of our first brief, that it would be a wide departure from the usual scope of *habeas corpus* and from its legitimate use, as we regard it, to sanction its application to the purpose of deciding upon the sufficiency of the allegations of the indictment *under the*

Texas law, before *any interpretation* thereof by the courts of that State. Such a use of the writ would not be tolerated while the cause was pending before an examining magistrate.

Ex parte McCorkle, 29 Tex. App. 20
Robertson *v.* State, 36 Tex. 346

And it has been often held by this and other federal courts that the petitioner should generally be left to his remedy by writ of error, if he shall have any ground to complain, after the state judicial authority has acted, it being assumed (in advance of such action) that such action will conform to the principles and precepts of law. *Omnia rite acta* is a presumption which should be applied, in circumstances such as here appear.

Munsey *v.* Clough, 196 U. S. 324
Baker *v.* Grice, 169 U. S. 284
Horner *v.* U. S., 143 U. S. 570
MacKenzie *v.* Barrett, 144 Fed. 954
Minn. *v.* Brundage, 180 U. S. 499
In re Dowd, 133 Fed. 747
In re Lewis, 114 Fed. 963

Where the questions involved turn on the construction of state law, the use of *habeas corpus* to obtain such construction by the federal courts has been disapproved heretofore.

Spencer *v.* Silk Co., 191 U. S. 530
Storti *v.* Mass., 183 U. S. 142
Ex parte Moebus, 148 Fed. 39
Terlinden *v.* Ames, 184 U. S. 270
Ex parte Prince, 27 Fed. 196
Carfer *v.* Caldwell, 200 U. S. 293.

One fundamental principle of procedure should not be forgotten throughout this case, namely, that according to deliberate and carefully considered judgments of this court and of other courts, *habeas corpus* should not be sanctioned to secure the discharge of persons in the position of petitioner herein, unless the court of the process is WITHOUT JURISDIC-

TION. *Having* JURISDICTION, and in advance of any opportunity to consider questions of law such as are here submitted, the court of the indictment should not be invaded and its functions assumed by some other court, however high its rank, even by the use of this great writ of *habeas corpus*. Only in case of total *want of power* in that court of first instance to proceed, should such an application of this writ be allowed.

Turner *v.* Conkey, 132 Ind. 248
Ex parte Powers, 129 Fed. 985
Perry *v.* Pernet, 74 N. E. 609
Farrell *v.* Hawley, 78 Conn. 150 (61 Atl. 502)
In re Terrill, 144 Fed. 616
People *v.* Heider, (Ill.) 80 N. E. 291

Some other cases to the same purport are cited in our first brief and need not be repeated.

IN CONCLUSION, we respectfully suggest that *"full faith and credit"* be given by this Honorable Court to the *"judicial proceedings"* in question in the State of Texas. There is no claim, and no sort of basis for suspecting, that the petitioner will receive any other or different treatment by the courts and the people of Texas than accords with the law and the facts as they appear. Every right to which he is justly entitled can be fully protected by due process of law, as usually followed in the case of the humblest citizen, without the need of invoking a writ of error in advance, as this attempt to use *habeas corpus*, at this stage of the proceedings, appears to be.

Texas is fully capable of administering her own laws, and respectfully desires to be permitted so to do. This proceeding attempts to bring the federal courts to administer and construe the laws of Texas in a way which we regard as unusual, unnecessary and contrary to the principles and precepts declared in many former opinions of this high Court. We hope the attempt will fail.

When all is said, we submit that the judgment pronounced by his Honor, Judge ADAMS, in the Circuit Court below, was sound, and should be affirmed.

F. J. McCORD
Assistant Attorney General of Texas,
THOMAS T. FAUNTLEROY
SHEPARD BARCLAY
Counsel for Appellee and for
The State of Texas

APRIL, 1908

PIERCE *v.* CREECY, CHIEF OF POLICE OF THE CITY OF ST. LOUIS.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MISSOURI.

No. 357. Argued April 20, 21, 1908.—Decided June 1, 1908.

Whether or not the indictment on which the demand for petitioner's surrender for interstate extradition is based charges him with crime within the requirements of Article IV, § 2, par. 2, of the Federal Constitution, involves the construction of that instrument, and a direct appeal lies to this court from the Circuit Court under § 5 of the Judiciary Act of 1891.

While no person may be lawfully extradited from one State to another under Article IV, § 2, par. 2 of the Federal Constitution unless he has been charged with crime in the latter State, there is no constitutional requirement that there should be anything more than a charge of crime, and an indictment which clearly describes the crime charged is sufficient even though it may possibly be bad as a pleading.

The Federal courts cannot, on *habeas corpus*, inquire into the truth of an allegation presenting mixed questions of law and fact in the indictment on which the demand for petitioner's interstate extradition is based; and *quære* whether it may inquire whether such indictment was or was not found in good faith.

A Federal court should not, unless plainly required so to do by the Constitution, assume a duty the exercise of which might lead to a miscarriage of justice prejudicial to the interests of a State.

THIS is an appeal directly to this court from a judgment of the Circuit Court upon a writ of *habeas corpus*, remanding the petitioner, now appellant, to the custody of the respondent, now appellee. The petition for the writ of *habeas corpus* alleges that the petitioner was "imprisoned, detained, confined and restrained of his liberty, at the city of St. Louis, within the district aforesaid, by Edmund P. Creecy, the chief of police of said city of St. Louis, in violation of the laws and Constitution of the United States." There is no dispute about the facts, which, as they appear in the petition and the return, are as follows.

The Governor of the State of Texas made a requisition upon the Governor of the State of Missouri, which is as follows:

"To the Governor of the State of Missouri:

"Whereas, it appears by the annexed documents, which are hereby certified to be authentic, that H. Clay Pierce stands charged with false swearing, committed in the State of Texas, and information having been received that the said H. Clay Pierce has fled from justice and has taken refuge in Missouri.

"Now, therefore, I, T. M. Campbell, Governor of the State of Texas, have thought proper, in pursuance of the provisions of the Constitution and laws of the United States, to demand the surrender of the said H. Clay Pierce as fugitive from justice, and that he be delivered to G. S. Mathews, who is hereby appointed the agent, on the part of the State of Texas, to receive H. Clay Pierce.

"Given under my hand and seal of the State, affixed at the city of Austin, this 11th day of February, A. D. 1907, and of the independence of the United States of America, the one hundred and thirty-first, and of Texas the seventy-first year.

"T. M. Campbell, *Governor*."

To this requisition was attached a certified copy of an indictment against the petitioner. The indictment is as follows:

"In the name and by the authority of the State of Texas.

"The grand jurors of Travis County, in said State, duly empaneled, sworn and charged as such at the September term, A. D. 1906, of the District Court of said county, in and for the Fifty-third Judicial District, upon their oaths, in said court, present: That Henry Clay Pierce, in said county and State, on or about the 31st day of May, in the year of our Lord nineteen hundred, and before the presentment of this indictment, did then and there present himself and make his personal appearance before N. H. Nagle, a duly and legally qualified and acting notary public within and for the county of Travis and State of Texas, who was then and there duly authorized by law as such officer and notary public to administer an oath; and the said

Henry Clay Pierce, having been duly sworn by the said N. H. Nagle, acting in her capacity as such officer and notary public, did then and there unlawfully, deliberately, corruptly and willfully, under the sanction of the oath so legally administered to him by the said N. H. Nagle, acting in the capacity aforesaid, make his voluntary false statement and declaration in writing, as follows:

"*Affidavit.*

"The State of Texas, County of Travis:

"I, Henry Clay Pierce, do solemnly swear that I am the President (President, Secretary, Treasurer or Director) of the corporation known and styled Waters-Pierce Oil Company, duly incorporated under the laws of Missouri, on the 29th day of May, 1900, and now transacting or conducting business in the State of Texas, and that I am duly authorized to represent said corporation in making this affidavit, and I do further solemnly swear that the said Waters-Pierce Oil Company, known and styled as aforesaid, has not since the 31st day of January, 1900, created, entered into or become a member of, or a party to, and was not, on the 31st day of January, 1900, nor at any day since that date, and is not now, a member of or a party to any pool, trust, agreement, combination, confederation or understanding with any other corporation, partnership, individual or any other person or association of persons to regulate or fix the price of any article of manufacture, mechanism, merchandise, commodity, convenience, repair, any product of mining, or any article or thing whatsoever, or the price or premium to be paid for insuring property against loss or damage by fire, lightning, storm, cyclone, tornado, or any other kind of policy issued by the parties aforesaid; and that it has not entered into or become a member of or a party to any pool, trust, agreement, contract, combination or confederation to fix or limit the amount of supply or quantity of any article of manufacture, mechanism, merchandise, commodity, convenience, repair, or any product of mining, or any article or thing what-

soever, or the price or premium to be paid for insuring property against loss or damage by fire, lightning, storm, cyclone, tornado, or any other kind of policy issued by the parties aforesaid; and that it has not issued, and does not own any trust certificates for any corporation, agent, officer or employé, or for the directors or stockholders of any corporation, has not entered into, and is not now in any combination, contract, or agreement with any person or persons, corporation or corporations, or with any stockholders or directors thereof, the purpose and effect of which said combination, contract, or agreement would be to place the management or control of such combination or combinations, or the manufactured product thereof, in the hands of any trustee, or trustees, with the intent to limit or fix the price, or lessen the production and sale of any article of commerce, use or consumption, or to prevent, restrict, or diminish the manufacture or output of any such article; that it has not entered into any conspiracy, defined in the preceding sections of this act, to form or secure a trust or monopoly in restraint of trade; that it has not been since January 31, A. D. 1900, and is not now, a monopoly by reason of any conduct on its part, which would constitute it a monopoly under the provisions of sections 2, 3, 4, 5, 6, 10, and 11 of this act, and is not the owner or lessee of a patent to any machinery intended, used or designed for manufacturing any raw material or preparing the same for market by any wrapping, baling or other process, and while leasing, renting or operating the same, refuses or fails to put the same on the market for sale; that it has not issued and does not own any trust certificates, and has not, for any corporation or any agent, officer or employé thereof, or for the directors or stockholders thereof, entered into, and is not now in any combination, contract or agreement with any person or persons, corporation or corporations, or with the stockholders, director or any officer, agent, or employé of any corporation or corporations, the purpose and effect of which combination, contract or agreement would be a conspiracy to defraud, as defined in section 1 of this act, or to

create a monopoly, as defined in sections 2, 3, 4, 5, 6, 10 and 11 of this act.

"HENRY CLAY PIERCE,
"*(President, Secretary, Treasurer or Director).*

'Subscribed and sworn to before me, a notary public within and for the county of Travis, this 31st day of May, 1900.

(Signed) "N. H. NAGLE,
"*Notary Public.*

"Whereas in truth and in fact the said Waters-Pierce Oil Company, mentioned in the above false statement and declaration in writing, had since the 31st day of January, 1900, created, entered into, and became a member of, and a party to, and was on the 31st day of January, 1900, and on every day since the 31st day of January, 1900, up to and on the 31st day of May, 1900, then and there a member of, and a party to, a pool, trust, agreement, combination, confederation and undertaking with other corporations, individuals, and other persons and association of persons, to wit, with the Standard Oil Company of New Jersey, a corporation incorporated under the laws of the State of New Jersey, and with all the Standard Oil Companies of the United States, the names and descriptions of said companies being to said grand jurors unknown after diligent inquiry, and with John D. Rockefeller, John D. Archbold, H. H. Rogers and other individuals and persons whose names and a description of whom are to said grand jurors unknown after diligent inquiry, to regulate and fix the price of petroleum and all of the products of petroleum, being articles of manufacture and a commodity and a convenience and a product of mining and an article and a thing: and, whereas, in truth and in fact the said Waters-Pierce Oil Company, hereinbefore mentioned, had, since the 31st day of January, 1900, created, entered into and become a member of, and a party to, and was on the 31st day of January, 1900, and was on every day since the said 31st day of January, 1900, up to and on the 31st day of May, 1900, then and there a member of and a party to a pool, trust, agree-

ment, combination, confederation and undertaking with other corporations, individuals, and other persons and association of persons, to wit, the Standard Oil Company of New Jersey, a corporation incorporated under the laws of the State of New Jersey, and with all the Standard Oil Companies of the United States, the names and descriptions of said companies being to said grand jurors unknown after diligent inquiry, and with John D. Rockefeller, John D. Archbold, H. H. Rogers and other individuals and persons whose names and a description of whom are to said grand jury unknown after diligent inquiry, to fix and limit the amount of supply and quantity of petroleum and all of the products of petroleum, the said petroleum and all the products of petroleum being articles of manufacture and a commodity and a convenience and a product of mining and an article and a thing; and whereas in truth and in fact the said Waters-Pierce Oil Company, hereinbefore mentioned, had since the 31st day of January, 1900, and on every day since said 31st day of January, 1900, up to the 31st day of May, 1900, issued, and did then and on the 31st day of May, 1900, issue trust certificates to another corporation, to wit, the Standard Oil Company of New Jersey, hereinbefore described, its agents, officer and employee, to wit, one J. P. Gruet, and one John D. Johnson, and other agents, officers and employees of said Standard Oil Company of New Jersey, whose names and descriptions are to said grand jurors unknown, after diligent inquiry, whereby the said Standard Oil Company of New Jersey then and there became the owner of the majority of all the shares of stock of the said Waters-Pierce Oil Company and the owner of a controlling interest in said Waters-Pierce Oil Company, which said false statement, so made as aforesaid by the said Henry Clay Pierce, was not then and there required by law, nor made in the course of judicial proceedings. Yet the same was then and there, nevertheless, willfully and deliberately made, and was willfully and deliberately false, as he, the said Henry Clay Pierce, then and there well knew.

"Against the peace and dignity of the State."

To this petition the Governor of Missouri responded by issuing a warrant for the arrest of the petitioner and his delivery to the agent of the State of Texas.

While the respondent held the petitioner in custody upon this warrant the writ of *habeas corpus* was issued. The petitioner, after alleging that he was held in custody by the respondent solely by virtue of the warrant issued by the Governor of Missouri, further alleged in his petition:

"That said restraint, imprisonment, detention and confinement are illegal, and that the illegality thereof consists in this, to wit:

"First. It is not shown by any sufficient averments in the said indictment that the facts stated or opinions expressed by petitioner in the affidavit set forth in said indictment were false when the said affidavit was made, and hence the indictment charges no offense under the laws of the State of Texas. That so far as the averments of the said indictment are concerned, the conclusion, judgment and opinion of petitioner expressed in the affidavit are only alleged to be false in the conclusion, judgment and opinion of the grand jury preferring said indictment.

"Second. That the affidavit made by your petitioner was in the form prescribed by an act of the legislature of the State of Texas, entitled 'An act to prohibit pools, trusts, monopolies and conspiracies to control business and prices of articles; to prevent the formation or operation of pools, trusts, monopolies and combinations of charters of corporations that violate the terms of this act, and to authorize the institution and prosecution of suits therefor,' which was approved May 25th, 1899, and became effective January 31st, 1900 (Gen. Laws Texas, 1899, p. 246), and that the language of said affidavit must be construed and interpreted in connection with the related text of the act of which it forms a part; that the pools, trusts, combinations, conspiracies and monopolies prohibited by said act were such only as were formed by such natural or artificial legal entities as were then engaged in business in the State of Texas,

and the indictment does not show or charge, that the Waters-Pierce Oil Company, organized on May 29, 1900, as stated by petitioner in said affidavit, contrary to the fact stated by your petitioner in said affidavit, was a member of, or party to, any pool, trust, agreement, combination, confederation, or understanding with any other corporation, partnership, individual or any person or association of persons, then or theretofore transacting or doing business in the State of Texas, for the purpose of fixing the price or limiting the output or quantity of any article or thing whatsoever to be sold or marketed in said State of Texas.

"Third. That no charge of perjury or false swearing could legally be predicated upon any matter or thing stated in said affidavit, for the reason that the statements therein contained are mere expressions of legal conclusions or opinions upon a state of facts existent in the belief of the affiant.

"Fourth. The affidavit, being required by law, if false, could not be false swearing under the laws of the State of Texas.

"Fifth. For that it appears upon the face of the said indictment that more than four years elapsed between the date of the commission of the alleged offense and the finding of the said indictment."

No other grounds of the illegality of the petitioner's imprisonment than these were alleged in the petition.

Mr. Joseph H. Choate and *Mr. Joseph H. Choate, Jr.*, with whom *Mr. Henry S. Priest* was on the brief, for appellant:

Where a petition to a Circuit Court of the United States for a writ of *habeas corpus* raises a question of the construction or application of the Constitution of the United States, the case falls within § 5 of the act of March 3, 1891, and an appeal may be taken directly to this court. *Boske* v. *Comingore*, 177 U. S. 459; *Craemer* v. *Washington*, 168 U. S. 124; *In re Marmo*, 138 Fed. Rep. 201.

In this case the petition distinctly alleged that the detention of the appellant was in violation of the Constitution of the

United States, in that the indictment upon which the extradition proceedings were based did not constitute a "charge of crime" within the meaning of Art. IV, § 2, subd. 2 of the Constitution and therefore did not justify the arrest. This raised a question of the construction and application of the Constitution. *Roberts* v. *Reilly*, 116 U. S. 80; *Matter of Strauss*, 197 U. S. 324, which was the substantial question litigated as appears from the opinion below, to which the court may and should refer. *Loeb* v. *Columbia Township*, 179 U. S. 472.

The appeal to this court was properly taken and the fact that a separate appeal was subsequently taken to the Circuit Court of Appeals could not affect the jurisdiction of this court, which had already attached. *Columbus Co.* v. *Crane Co.*, 174 U. S. 600. Nor could the subsequent appeal constitute a waiver of this appeal. *Pullman Co.* v. *Central Co.*, 171 U. S. 138.

The validity of the warrant on which the appellant was arrested depends upon the substantial sufficiency of the indictment on which it was based. Unless that indictment, when tested as on motion in arrest of judgment, is capable of supporting a conviction, the requirements of the Constitution are not fulfilled and the extradition is unauthorized.

The right of interstate extradition does not exist by comity. It rests upon Art. IV, § 2, subd. 2, of the Constitution and upon the legislation of Congress (Rev. Stat. § 5278, act of February 12, 1793, c. 7, 1 Stat. 302). *Ex parte Morgan*, 20 Fed. Rep. 298; *In re Kopel*, 145 Fed. Rep. 505. Whenever a State attempts to exercise the power to extradite, the proceedings must conform to the requirements of the Constitution and of the act of Congress or they will be unauthorized and void.

The meaning of the words "charged with crime" as used in the Constitution, is that the person whose surrender is demanded shall have been "charged in due form of law in some proper judicial proceeding instituted in the State from which he is a fugitive. This charge is to be the foundation for the demand and for the warrant of surrender; and it cannot be

sufficient unless it contains all the legal requisites for the arrest of the accused and his detention for trial if he were within the State." Cooley, J., in Princeton Review, January, 1879, p. 165; Spear on Extradition (2d ed.), p. 376; *Ex parte Smith*, 3 MacLean, 121; *People ex rel. Lawrence* v. *Brady*, 56 N. Y. 182; *Roberts* v. *Reilly*, 116 U. S. 80, and cases cited.

The strictly analogous cases where, on *habeas corpus*, the release is sought of prisoners held for removal from one judicial district of the United States to another, also support the view above stated. *Stewart* v. *United States*, 119 Fed. Rep. 89; *In re Terrell*, 51 Fed. Rep. 213; *Greene* v. *Henkel*, 183 U. S. 249; *Tinsley* v. *Treat*, 205 U. S. 20; *In re Buell*, 3 Dill. 116; *In re James*, 18 Fed. Rep. 853; *United States* v. *Brawner*, 7 Fed. Rep. 86; *In re Dana*, 68 Fed. Rep. 886.

The indictment involved in this proceeding was fatally defective.

An indictment alleging merely that the accused made the statement and that it was false is insufficient, not because of any mere rule of pleading, but because of the omission to allege the facts inconsistent with the statements, which facts are part, not merely of the proper statement of the crime, but of the crime itself. In the absence of these facts the allegations that the statement was false is a mere conclusion of the pleader. The facts which constitute the truth must, therefore, be distinctly alleged, not because they are a requirement of the indictment as a pleading, but because without them the crime of false swearing can be shown only by conclusions.

The assignments of perjury or false swearing, moreover, must not only allege distinctly, and not by way of conclusion, what the true facts were, but must serve to demonstrate the falsity of the facts sworn to. If all that the assignments set out may be true and still be entirely consistent with the truth of the matter alleged to be false, there can be no substantial charge of false swearing, since nothing in the facts alleged would serve to impeach or destroy the truth of the facts sworn to by the accused. If the facts alleged to be true by the as-

signments of false swearing, and the facts sworn to by the accused are not inconsistent, the indictment is equivalent to a charge that the accused perjured himself in swearing to statements which were true. The statements alleged to be false and the statements alleged by the assignment to be true must in tenor and meaning be inconsistent so that both cannot by the same tokens of interpretation or inference be true. *Reg* v. *Whitehouse*, 3 Cox, C. C. 86; 2 Bishop's New Crim. Procedure, § 918.

The fact that the crime of perjury or false swearing cannot legally be charged without assignments of falsity sufficient within the above reasoning, is perfectly established in Texas. *Gabrielsky* v. *State*, 13 Tex. App. 428; *Higgins* v. *State*, 38 Tex. Crim. App. 539; *S. C.*, 43 S. W. Rep. 1012 (1898); *McMurtry* v. *State*, 38 Tex. Crim. App. 521; *S. C.*, 43 S. W. Rep. 1010 (Texas, 1885); *Morris* v. *State*, 83 S. W. Rep. 1126; *Turner* v. *State*, 30 Tex. Crim. App. 691. The indictment fails substantially to charge the crime of false swearing, because the statements alleged in the indictment to have been falsely sworn to by the appellant, are not statements of fact, but are expressions of mere opinions, beliefs and conclusions, upon which the crime of false swearing cannot be predicated.

The assignments of falsity are insufficient. No facts are alleged which are necessarily inconsistent with the statements of the appellant's affidavit.

The indictment fails to inform appellant of the charge against him with that degree of reasonable certainty which will enable him to prepare his defense.

The indictment discloses upon its face that, at the time it was filed, the prosecution was barred by the statute of limitations.

The indictment itself discloses the fact that it was not found in good faith.

The indictment is based upon an affidavit required by law, which cannot be the subject of a prosecution for the statutory crime of false swearing.

Mr. F. J. McCord and *Mr. Shepard Barclay*, with whom *Mr. Thomas T. Fauntleroy* was on the brief, for appellee:

There is no Federal question presented by this record. No one of the defects alleged to exist in the indictment involves the construction or application of the Constitution or of any law of the United States; no one of them invokes or asserts any right, privilege or immunity under the Federal Constitution or laws. *World's Exposition* v. *United States*, 56 Fed. Rep. 657; *Mining Co.* v. *Hanley*, 205 U. S. 233; *Carfer* v. *Caldwell*, 200 U. S. 292.

A mere charge of a crime, defined by the criminal law of a State, formulated upon affidavit before some magistrate, without indictment by a grand jury, is a sufficient basis for extradition, under the Federal law. *Day* v. *Inhabitants*, 8 Allen, 478.

Other cases likewise hold that a charge of crime need not be by indictment. *Ryan* v. *People*, 79 N. Y. 593; *Drinkall* v. *Spiegel*, 68 Connecticut, 441; *In re De Giacomo*, 7 Fed. Cas., p. 366; *People* v. *Garnett*, 129 California, 364; *Rex* v. *Maynard*, Russ. & Ry. 240.

Every contention of illegality must be solved by interpretation of Texas law. Who shall make the interpretation? In the first instance, at least, the courts of that Commonwealth. The real issue of law is what the duly appointed courts of Texas hold as to the sufficiency of the indictment. *In re Voorhees*, 32 N. J. L. 141.

If those courts should err in the interpretation of their local enactments, the case would not thereby become one of Federal cognizance, unless in such ruling (or in the consequences thereof) some right, privilege, or immunity secured to petitioner by the Federal law was infringed. No such claim appears as yet and if it did, *habeas corpus* is rather a collateral method of raising such an issue. The petition for *habeas corpus* asserts that the indictment is insufficient according to the Texas law. Perhaps the courts of that State will agree with the petitioner. The Federal judiciary will not in advance of

any Texas interpretation of Texas law, interpose and assume that duty. *Carfer* v. *Caldwell*, 200 U. S. 292; *In re Lennon*, 150 U. S. 393. See also *Ex parte Moebus*, 148 Fed. Rep. 39; *Storti* v. *Massachusetts*, 183 U. S. 142; *Spencer* v. *Silk Co.*, 191 U. S. 530; *Drury* v. *Lewis*, 200 U. S. 1; *Empire Co.* v. *Hanley*, 205 U. S. 1.

If jurisdiction here exists, there is still no merit in this appeal.

Where the local court in question has jurisdiction of the subject-matter of the charge, mere insufficiency in the indictment in alleging facts to support the charge does not warrant a discharge on *habeas corpus*.

Whether facts charged in an indictment constitute a crime under the state statutes, the courts of the State should decide. It is their province to determine that question if they have jurisdiction of the subject-matter. *In re Belt*, 159 U. S. 95; *Hyde* v. *Shine*, 199 U. S. 62; *Riggins* v. *United States*, 199 U. S. 547; *Rogers* v. *Peck*, 199 U. S. 425; *Ex parte Moran*, 144 Fed. Rep. 594.

The use of *habeas corpus* (as sought in this case) is a collateral attack on the pending proceeding in the court of Texas, and is only maintainable if that court has no power to proceed at all. *Ex parte Watkins*, 3 Pet. 203; *United States* v. *Pridgeon*, 153 U. S. 59; *In re Kowalsky*, 73 California, 120.

The leading question on this branch of the case is whether the Texas court has jurisdiction of the offense alleged or of the charge, whatever may be said as to the sufficiency of the indictment.

If the facts are alleged in such way in the indictment as not to render the judgment of conviction thereon void on a collateral attack, then there is no ground to discharge on *habeas corpus*—for that only is available where the prisoner is held without jurisdiction. *Benson* v. *Henkel*, 198 U. S. 10; *Felts* v. *Murphy*, 201 U. S. 123; *Pierce* v. *Texas*, 155 U. S. 311; *Urquhart* v. *Brown*, 205 U. S. 179; *Hyde* v. *Shine*, 199 U. S. 62; *Carfer* v. *Caldwell*, 200 U. S. 293; *In re Lancaster*, 137 U. S. 393.

MR. JUSTICE MOODY, after making the foregoing statement, delivered the opinion of the court.

The first inquiry must be whether there is jurisdiction of this appeal, which was taken from the Circuit Court directly to this court. Since the passage of the act establishing the Circuit Court of Appeals (26 Stat. 826), appeals in *habeas corpus* cases from the District and Circuit Courts can only be taken to the Circuit Court of Appeals, unless they are of the kind specified in § 5 of the act, wherein a direct appeal to this court is allowed. *In re Lennon*, 150 U. S. 393. Of the latter class is "any case that involves the construction or application of the Constitution of the United States." In the case at bar the position of the appellant is that his detention in custody is unlawful, because the indictment, which is its only excuse, is not a charge of crime within the meaning of the provision of the Constitution regulating interstate extradition. Art. IV, § 2, par. 2. The precise and only question to be determined is whether the indictment constituted such a charge. The decision of this question requires us to ascertain and declare the meaning of the extradition clause, and therefore "involves the construction of the Constitution of the United States." *Craemer* v. *Washington*, 168 U. S. 124; *Boske* v. *Comingore*, 177 U. S. 459. And see *Wiley* v. *Sinkler*, 179 U. S. 58; *Motes* v. *United States*, 178 U. S. 458; *Cummings* v. *Chicago*, 188 U. S. 410. Against this view it is argued that the question whether this indictment is good under the laws of Texas brings under consideration only the laws of that State, and that, as there is no pretense that they violate the Constitution of the United States, there can be involved no construction or application of that Constitution. But the answer to this is that the laws of Texas are considered only as they are embraced in the ultimate inquiry whether the indictment constitutes a charge of crime in that State, and for no other purpose. It is further said by the appellee that the delivery up in this case was by virtue of state laws only, and we are invited to determine how far the State may make

laws for interstate extradition, independent of, though consistent with, the Federal Constitution. We decline to accept the invitation, because in the case at bar the demand of the Governor of Texas, which was complied with, was expressed to be "in pursuance of the provisions of the Constitution and laws of the United States." There is jurisdiction of the appeal.

The Constitution provides that "A Person charged in any State with Treason, Felony, or other Crime, who shall flee from Justice, and be found in another State, shall on Demand of the executive Authority of the State from which he fled, be delivered up, to be removed to the State having Jurisdiction of the Crime." No person may be lawfully removed from one State to another by virtue of this provision, unless: 1, He is charged in one State with treason, felony or other crime; 2, he has fled from justice; 3, a demand is made for his delivery to the State wherein he is charged with crime. If either of these conditions are absent the Constitution affords no warrant for a restraint of the liberty of any person. Here the only condition which it is insisted is absent is the charge of a crime. The only evidence of a charge of crime is the indictment, and the contention to be examined is that the indictment is insufficient proof that a charge has been made.

The counsel for the petitioner disclaim the purpose of attacking the indictment as a criminal pleading, appreciating correctly that the point here is not whether the indictment is good enough, over seasonable challenge, to bring the accused to the bar for trial. Counsel concede that they cannot successfully attack the indictment except by showing that it does not charge a crime. The distinction between these two kinds of attack, though narrow, is clear. But it will not do to disclaim the right to attack the indictment as a criminal pleading and then proceed to deny that it constitutes a charge of crime for reasons that are apt only to destroy its validity as a criminal pleading. There must be objections which reach deeper into the indictment than those which would be good against it in the court where it is pending. We are unable to adopt the test

suggested by counsel, that an objection, good if taken on arrest of judgment, would be sufficient to show that the indictment is not a charge of crime. Not to speak of the uncertainty of such a test, in view of the varying practice in the different States, there is nothing in principle or authority which supports it. Of course, such a test would be utterly inapplicable to cases of a charge of crime by affidavit, which was held to be within the Constitution. *In the Matter of Strauss*, 197 U. S. 324. The only safe rule is to abandon entirely the standard to which the indictment must conform, judged as a criminal pleading, and consider only whether it shows satisfactorily that the fugitive has been in fact, however inartificially, charged with crime in the State from which he has fled. *Roberts* v. *Reilly*, 116 U. S. 80, 95; *Pearce* v. *Texas*, 155 U. S. 311, 313; *Hyatt* v. *Corkran*, 188 U. S. 691, 709; *Munsey* v. *Clough*, 196 U. S. 364, 372; *Davise's Case*, 122 Massachusetts, 324; *State* v. *O'Connor*, 38 Minnesota, 243; *State* v. *Goss*, 66 Minnesota, 291; *Matter of Voorhees*, 32 N. J. L. 141; *Ex parte Pearce*, 32 Tex. Crim. 301; *In re Van Sciever*, 42 Nebraska, 772; *State* v. *Clough*, 71 N. H. 594.

Before proceeding further, it is well to set forth all the objections to the indictment made by counsel, in order to see whether, if any one of them is well founded, it shows that there was no charge of crime against the petitioner. For if all criticisms of the indictment should be approved, and they leave untouched in the pleading enough to show that the petitioner was charged with crime in the broad and practical sense in which those words ought to be understood, the condition prescribed by the Constitution has been performed.

The objections to the indictment which were advanced in the argument are six in number:

1. The statements in respect to which false swearing is alleged are not statements of facts but of opinion, and therefore, however falsely made, cannot amount to the crime of false swearing.

2. The assignments of falsity are insufficient, for no facts are

alleged which are necessarily inconsistent with the alleged false affidavit.

3. The charge is not alleged with the certainty required in an indictment.

4. Upon the face of the indictment the prosecution is barred by the statute of limitations.

5. The indictment discloses the fact that it was not found in good faith.

6. The affidavit was required by law, and therefore, if false, under the Texas law, lays the foundation for a prosecution for perjury, but not for false swearing.

The fifth and sixth objections require separate discussion. We are not informed of any principle by which we may inquire whether an indictment, duly found, was returned in good faith, but, whether that power exists or not, it is enough to say here that this objection does not seem to be true in fact.

Under the Texas law the crime of false swearing, as distinguished from perjury, can only be committed by a false oath to a voluntary declaration or affidavit, "not required by law or made in the course of a judicial proceeding." The sixth objection asserts that the affidavit set forth in this indictment was one required by law. But this assertion is in the teeth of the allegation of the indictment, that the affidavit "was not then and there required by law nor made in the course of judicial proceedings." We cannot inquire into the truth of this allegation, which may present a mixed question of law and fact.

All the other objections are appropriate to a demurrer or a motion to quash or in arrest of judgment. They are attacks upon the indictment as a criminal pleading, the right to make which counsel expressly renounce. If well founded, they show that the indictment is bad. But the Constitution does not require, as an indispensable prerequisite to interstate extradition, that there should be a good indictment, or even an indictment of any kind. It requires nothing more than a charge of crime. Congress, in aid of the execution of the constitutional

provision, has enacted a law (§ 5278, Rev. Stat.), directing that the charge shall be made either by "an indictment found" or "an affidavit made before a magistrate;" and, as we have seen, this court has held that such an affidavit is sufficient, saying (197 U. S. 331), "doubtless the word 'charged' was used in its broad signification to cover any proceeding which a State might see fit to adopt, by which a formal accusation was made against an alleged criminal." But it is obvious that an objection which, if well founded, would destroy the sufficiency of the indictment, as a criminal pleading, might conceivably go far enough to destroy also its sufficiency as a charge of crime. Are then the objections made to the indictment of that nature? Let it be assumed that these are all well taken. Let it be assumed, without decision, that the false statements contained in the affidavit were statements of opinion; that the assignments of falsity were bad, because no facts necessarily inconsistent with them were alleged; that the certainty required in criminal pleading was not observed; and that the time alleged antedates the indictment by more than the period of the statute of limitations. Nevertheless, the indictment alleges that on a day named the petitioner deliberately and willfully made, under the sanction of an oath, legally administered, a voluntary false statement and declaration in writing, to wit, the affidavit, and that the affidavit was not required by law or made in the course of a judicial proceeding. The indictment, whether good or bad, as a pleading, unmistakably describes every element of the crime of false swearing, as it is defined in the Texas Penal Code, in art. 209, which follows.

"If any person shall deliberately and willfully, under oath or affirmation legally administered, make a false statement by a voluntary declaration or affidavit, which is not required by law or made in the course of a judicial proceeding, he is guilty of false swearing, and shall be punished by imprisonment in the penitentiary not less than two nor more than five years."

This court, in the cases already cited, has said, somewhat vaguely but with as much precision as the subject admits, that

the indictment, in order to constitute a sufficient charge of crime to warrant interstate extradition, need shew no more than that the accused was substantially charged with crime. This indictment meets and surpasses that standard, and is enough. If more were required it would impose upon courts, in the trial of writs of *habeas corpus*, the duty of a critical examination of the laws of States with whose jurisprudence and criminal procedure they can have only a general acquaintance. Such a duty would be an intolerable burden, certain to lead to errors in decision, irritable to the just pride of the States and fruitful of miscarriages of justice. The duty ought not to be assumed unless it is plainly required by the Constitution, and, in our opinion, there is nothing in the letter or the spirit of that instrument which requires or permits its performance.

Judgment affirmed.